A

DISSERTATION,

SHEWING THAT

THE HOUSE OF LORDS,

IN CASES OF JUDICATURE,

ARE BOUND BY THE SAME RULES OF EVIDENCE THAT ARE OBSERVED BY ALL OTHER COURTS.

The Second Edition.

WITH

OBSERVATIONS

UPON

THE SUBJECTS OF LAW

WHICH HAVE ARISEN IN THE

Bill of Pains and Penalties

AT PRESENT PENDING AGAINST

THE QUEEN OF ENGLAND.

BY

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PREFACE.

THE following Dissertation was written more than twenty-eight years ago: and the Author trusts that the Observations he has subjoined upon the subjects of Law connected with the present Bill of Pains and Penalties will be thought equally true, and well-founded, as far as they are applicable to every species of Trial, which can be brought before the High Court of Parliament, even twenty-eight years after the present time.

He has that perfect confidence in the justice and wisdom of the Two Houses of Parliament, and also in the sound sterling sense of the People of England, that he cannot entertain a doubt, but, when the reasons for the final

conclusion of the present momentous subject (whatever it may be) are fairly and fully communicated to the world, it will be received with the general approbation of the Public.

Field Court, Gray's Inn,
Nov. 1, 1820.

A

DISSERTATION,

&c. &c.

In a Pamphlet, which I published in the course of last winter (viz. in 1791), containing the result of my inquiries concerning the effect of a dissolution of Parliament upon an unfinished Impeachment, the following observations were introduced*.

"Since

* The first time I appeared before the Public as a writer upon Law, was in the year 1791; when I published a Pamphlet with the title of "An Examination of Precedents and Principles, by which it appears that the Impeachment of Warren Hastings, Esq. is abated by the dissolution of Parliament."

I had, at the first, the modesty not to prefix my name to it; but finding that the authorities were approved by Lord Thurlow and the leading Lawyers of the day, I was induced to declare myself the author.

It was answered by the Hon. Spencer Perceval, then at the Bar. Mr. Pitt, the Prime Minister, adopted Mr. Perceval's side of the question: but how far the Profession adhered to my doctrine, will amply appear from the following paragraphs, which were published with this Treatise in 1792.

The important question, whether an impeachment was determined by a dissolution of Parliament after having undergone a discussion for three days in the House of Commons, was decided in the negative; the numbers being 143 and 30: and

" Since the commencement of the present Impeachment, a monstrous doctrine has been urged, which, if established, would arm the House of Lords with a despotic power, and might eventually prove

it must ever be considered as a most remarkable occurrence in the Legal history of this country, that in the minority were the votes of his Honour the Master of the Rolls, the Attorney and Solicitor General, six King's Counsel, one Serjeant, and several other Barristers of distinguished eminence.

When the same question was agitated in the House of Lords, it was again decided in the same manner; the numbers being there 66 and 18; and the Lord Chancellor, and the Lord Chief Justice of the King's Bench, voted in the minority. Previous to any public investigation of this question, the author of this Dissertation was induced to collect and examine the authorities upon the subject, and to publish as his decided opinion, that an impeachment was terminated by a dissolution of Parliament*.

From the strenuous support which this side of the question received from the most learned part of the Profession of the Law, and from an attentive consideration of all that great abilities and industry have produced on the other, he must ever look back at that opinion with pride and satisfaction. But for the conclusion which we Professional men were obliged to draw from an unprejudiced examination of the subject, we have

* Vide an Examination of Precedents and Principles, by Ed. Christian. 2d edition.

At that time the Master of the Rolls was Sir Richard Pepper Arden; the Attorney and Solicitor General, Sir Archibald Macdonald and Sir John Scott; the Chancellor, Lord Thurlow; Lord Chief Justice of the King's Bench, Lord Kenyon.

prove fatal to our liberty and constitution; which is, that they are not bound, like inferior courts, by the rigid and inflexible rules of evidence, but may admit, at their discretion, any species of information which they may think necessary for the investigation of truth.

" But I trust that the Lords will always have wisdom and virtue to reject such pernicious propositions, and will remember, that, in their character of judges, it is their province *jus dicere,* and not *jus dare*†.

" The rules of evidence, likes the rules of morality, are presumed to be founded, in the best sense possible,

have been treated with a degree of obloquy unparalleled in the history of England. We have even been charged with waging war against the liberties and constitution of the country. We may have been mistaken; but the principle, which directed us to that conclusion, is fixed, I trust, upon too solid a foundation in our minds, ever to be shaken by the *civium ardor prava jubentium.*

† " This may be thought to be expressed with an unbecoming vehemence. It is a doctrine which I have frequently been obliged to reprobate among the circle of my friends; and I introduce it here, to enforce that universal principle, that the spirit and substance of English liberty consist in the strict adherence to rules and the letter of the Law; and the more we introduce of arbitrary discretion, the more we shall approximate to the detestable maxims of the Eastern Governments."

possible, in reason and wisdom matured and confirmed by the experience of ages; and in all criminal proceedings, both in the highest and lowest courts, whether at the Quarter Sessions, or in the High Court of Parliament, and in the Court of the Lord High Steward, they are, and ought to be, precisely the same.

" And my Lord Coke solemnly cautions Parliaments *' to leave all causes to be measured by the golden and streight metwand of the Law, and not by the uncertain and crooked cord of discretion.'

" But though each of the two Houses of Parliament may do many acts, from which there is no remedy or appeal, yet I trust that they will always have such a conscientious regard to the extent of their privileges and jurisdiction, that they will never adopt the maxim, That they can do no wrong, because they can do wrong with impunity."

Some time subsequent to the publication of that Pamphlet, I was surprized to hear that a Gentleman of the first celebrity for talents in this country had declared, in the House of Commons, 'he could not suffer

* Inst. 41.

suffer so erroneous and dangerous a doctrine to pass unnoticed, especially as it came from one whose duty it was to instruct the rising generation in the true principles of the Law and Constitution of England,'—and that in a speech of considerable length he had endeavoured to prove and establish that the House of Lords are not bound by the laws of evidence, like other Courts*.

I am not insensible of the honour to be thought of sufficient consequence that any error of mine should deserve the animadversions and correction of one, who is regarded as a Pillar of the State, and whose peculiar and anxious care it has long been to provide, *Ne quid respublica detrimenti capiat.*

But the zealous and faithful sentinel, who would shed his best blood in the defence of the citadel, may know little of its internal structure, or how each part contributes to the security and happiness of the whole†.

The

* See the debates of the House of Commons in the Morning Chronicle of the 15th of February, 1791.

† The author of the argument against what I had so incidentally advanced upon Evidence before the House of Lords, was the Right Honourable Edmund Burke.

It is the only error, which I am at present acquainted with, that he ever committed; and it is one of such a magnitude, that

The imputation of ignorance and temerity in denying the truth of a proposition, which I have always heard with astonishment; and the apprehension to the community, if it is false, when sanctioned by a name of such respectability; have induced me to compile this Dissertation, and to obtrude my opinion once more upon the Public.

It is perhaps a melancholy consideration to this country, that men of the greatest abilities generally imagine

that it certainly affords me some pride and exultation that it has fallen to my lot to correct it; for I never met with any reader of this Dissertation, who did not declare that he was convinced by it.

The talents displayed by that wonderful man, in resisting the progress of Revolutionary madness and wickedness, and in predicting their fatal consequences, had the extraordinary semblance of divination. In a publication I am now printing upon the Rights and Liberties of Englishmen, after making use of a splendid quotation from his works, I have thought it my duty to subjoin the following note :—

" I should most earnestly recommend to every student, who is ambitious of obtaining distinction by making himself useful to his country, to peruse attentively the works of the Right Hon. Edmund Burke, and the works which contributed to his celebrity. I have been assured by his most confidential friends, that the Scriptures lay constantly upon his table, and that he declared that he read all Cicero's works over every year. From such a course of studies we may expect all that can adorn human nature, and can support and improve, for the liberty and happiness of the subjects, every human government.

imagine that they can comprehend the most important of all sciences by intuition, and that they possess more refined and exalted ideas of law and justice than those who are daily concerned in the administration of them; for it has been a common custom of late to ridicule the authority of our Profession, and to pronounce that whatever we presume to suggest is nothing but special pleading and Old-Bailey practice*.

But those who are firm in their principles, and steady

* Far be it from me to treat such important departments of the Law of England with disrespect. When forms are essential to the administration of justice, the distinction between form and substance is idle and superfluous. Forms are the scales, without which justice could not equally be distributed: if these were disregarded, uncertainty and confusion would be inevitable. But when forms cease to answer the ends proposed, they ought to be altered by Parliament: our judges cannot legislate.

With regard to the Old Bailey, though I have never had occasion to attend there professionally, yet I can declare that I have never heard that any thing was attempted by the Gentlemen of the Profession who practise there, which the severest of the Judges would decline, if he were at the bar, and the case required it. And as a learned Recorder and his Majesty's Judges preside upon the bench, and the prisoners are tried by respectable juries from the city of London according to the Law of England, one may fairly conclude that justice is administered there with as much purity as in any Court under heaven.

steady to their purpose, will never sacrifice the liberty of their country to the popularity of the day, or cut the Law of England, like a birth-day suit, to the fashion of the times.

We must bear patiently to be taunted with our inferiority in every debate, in which from our profession it is expected we should excel. We have not the choice which Dr. Johnson, in his younger years, was eager to adopt:—"When I was a boy," says he, "I used always to chuse the wrong side of a debate; because most ingenious things, that is to say, most new things, could be said upon it."

An Orator, who is not confined by the rules and authorities of Law, can find a thousand entertaining arguments to support what he has advanced; and by appealing to the passions and good sense of his audience, he is sure to conciliate the favour and gain the applause of the vulgar and undiscerning.

But the Lawyer must rely entirely upon his case and his authority; which though it sometimes may be absurd and *perquam durum*, yet will admit of one argument sufficiently convincing with men of sense, that it is the *lex scripta*, or the law of the land. Of late we have forgotten those venerable records, which my Lord Coke says it cheers one to think

think of, and which are the noble declarations of the rights of Englishmen.

But let us ever remember, that in the first of our written laws we find,

Nullus liber homo capiatur, vel imprisonetur, aut disseisiatur de libero tenemento suo, vel libertatibus, vel liberis consuetudinibus suis, aut utlagetur, aut exulet aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per LEGALE JUDICIUM PARIUM SUORUM, VEL PER LEGEM TERRÆ.—Magna Charta.

Who that has the spirit of an Englishman can read this without involuntarily pressing his hand upon his heart, and imprecating the vengeance of Heaven upon the violators of it. Notwithstanding the coarseness of the language, how poor and feeble is the *verbiage* of the modern declarations of Rights, compared with this first Great Charter of the liberties of Englishmen. But it has been discovered, that our ancestors have been guilty of a gross error; and what they thought they had transmitted to us as a treasure, is in fact an incumbrance and a nuisance. For how can the *Lex Terræ* be consistent with reason, justice, or liberty, which would put an end to a trial that had continued three years, or which would confine the prose-

cution

cution of that trial to the narrow rules of evidence observed in the inferior courts. Those who are unwilling to admit that the House of Lords upon the present occasion should be tied down to laws and rules, seem to have an illustrious instance for their argument,—

——— " I beseech you
Wrest once the laws to your authority !
To do a great right, do a little wrong."

But Shakspeare, that great master of nature—(and the best Governments are most conformable to nature*, or to the particular circumstances under which men are placed by nature)—will always be found to make his best and wisest characters express the truest and justest sentiments of law, liberty, and government. He firmly and boldly answers,

* It is not my intention to make any insinuation in favour of that contemptible expression ' *The Rights of Man,*' which, in my humble opinion, is disgraceful to the theory and philosophy of an enlightened people. It leaves a convenient ambiguity to sedition, to interpret it either the rights of a savage or a civilized man ; and in one sense at the least it is equally subversive of the best Governments, as the worst.—When men flock together, government is as necessary and as natural to the state of man, as raiment and habitations.

This note stood thus in the first edition. I have not changed my opinion upon the subject ; but the Reader will soon see it largely explained and illustrated in a work I have now in the press.

answers, and in the character too of a Lawyer—

"It must not be: there is no power in Venice
Can alter a decree established.
'Twill be recorded for a precedent,
And many an error by the same example
Will rush into the State:—it cannot be."

One of the great sources of liberty is the *certainty* of the Law; in which the subject can repose with confidence and security, as he foresees the certain consequences of all his actions.

It is the peculiar characteristic of the English Government to abhor *discretion;* which is equally slavery, whether it be pronounced by one, or the majority of 700. A power to dispense with law is alike dangerous and detestable, whether it be vested in the King, or any other part of the Government less than the supreme power of the State collected in the King, Lords, and Commons.

No sentiment has yet been uttered in or before the National Assembly of France more worthy of a great and a free people than this, viz. *Let the track of the Law be pursued, though it should lead over burning ploughshares*.*

This

* A declaration made before the National Assembly by the citizen soldiers of Sainte Opportune, Oct. 7, 1791.

Since that time to the present year 1820, this is the only sentence which I have seen worth importing from France.

This noble maxim I should wish to have written, in conspicuous characters, in every court and place in the kingdom where legal judgments and resolutions are to be pronounced.

We are frequently entertained by eloquent declamations upon liberty and substantial justice; but the enthusiasm of the orator is apt to hurry him beyond the bounds of utility, and the practicability of human affairs. He can paint the distant landscape in all the colouring and beauty of art and nature, but he cannot find his way to those pleasing objects before his eyes, of which he gives us so agreeable a representation.

I should have imagined, previous to any investigation of the question, that, in a country governed by equal laws, no proposition could be more simple and evident than this, viz. that the guilt and innocence of every subject must be manifested by the same *media* of proof, or by the same rules of evidence: and that one might have been warranted in closing the controversy, by declaring, that *contra negantem principia non est disputandum.* When a proposition is so clear that no clearer proposition can be brought in support of it, it is self-evident, and incapable of demonstration; for all human reasoning is a gradual progression from undeniable

undeniable truths, or, by certain steps, to what without such aid would be uncertain and obscure.

And nothing can be more irksome to an author, than to be obliged to undertake the proof of a doctrine, of which he hardly conceives a doubt can be entertained; as he must necessarily apprehend that he will incur the imputation of puerility and frivolity, or insult the understanding of his reader.

Before I proceed to the consideration of the law of Evidence, which is perhaps the most beautiful and philosophical branch of English jurisprudence, I think it not foreign to my purpose to give a short explanation of the policy of laws, and the general rules which are essential to the administration of public justice.

It has been asked, *Vir bonus est quis?*—and it was answered by one unacquainted with the distinction between the private practice of morality and the public administration of justice,—

Qui consulta patrum, qui leges juraque servat :

and therefore it might justly be replied,

Sed videt hunc omnis domus, vicinia tota
Introrsum turpem, speciosum pelle decorâ*.

Religion

* Hor. Epist. Lib. I. Epist. 16.

Religion and morality enjoin us to cherish a spirit of good-will and benevolence, and to discharge the reciprocal obligations of society. If their voice were heard, and their precepts in every instance observed, Government would be a superfluous pageant, and the Law a dead letter. But such is the imperfection of human nature and human establishments, that *it is impossible but that offences will come;* yet it is the wisdom and object of every Government, but particularly of that constitution under which we have the happiness to live, to endeavour to diminish their number in as great a degree as the nature of things will admit. Where perfection is denied, prudence consists in aiming at the best that is practicable; and true excellence, in attaining it. The prevention of injustice, or the maxim, *Of two evils chuse the least*, is the principle which pervades almost the whole system of English jurisprudence.

A man is as much bound by every religious and moral consideration to discharge a debt or compensate an injury after six years, as he was the moment after he had contracted the one, or had been guilty of the other; but the Law permits him to do an act of great injustice by pleading a limitation of time in bar to the demand for satisfaction. Those who made this law had found, by experience, that, for want of such a defence, much dishonesty

was

was practised in claiming and recovering debts which either had been discharged, or which had never existed: and though such a plea, by a person who is conscious he has never satisfied a fair and righteous demand, is as great an act of villainy, yet the Legislature of this country wisely thought, that by the introduction of such a statute* the sum of injustice would be considerably diminished. It was not intended as a weapon of offence, but a shield to protect. Paper, parchment, and sealing-wax can give no efficacy to the moral obligation of a promise or contract; but when verbal engagements were carried into execution by our courts of justice, it was discovered that much villainy and perjury were committed by swearing to contracts which never had existed, or where the terms of them were quite different from those sworn to: and though he who denies a real contract is not a much better man than he who swears to a false one, yet the Legislature thought that less injustice, upon the whole, would be done, if many of the most important contracts in society were not enforced by courts of justice, unless a written instrument was produced as the most certain evidence of their existence†.

The

* 21 Jac. I. c. 16.

† 29 Car. II. c. 3. An act for prevention of frauds and perjuries.

The same principle prevails in a great part of the Common Law. The moralists tells us, that *fides servanda est,* or, That every man is bound to keep a promise which has been accepted, or has raised expectation: but it is a maxim both of the Roman Law, and the Common Law of England, *Ex nudo pacto non oritur actio,* or, That no simple contract can be enforced in a court of justice which is made without an equivalent; which is technically called, *consideration;*—the law having wisely deemed, that less injury would be done to society if courts of justice took no cognizance of rash and precipitate promises: and it afforded a strong presumption that all promises were made without due consideration or deliberation, when no reciprocal benefit accrued to him who had made the promise.*

If a gentleman were paying his addresses to a lady where there was no disparity in their circumstances or impropriety in their union, it could scarce be considered a violation of morality if he should give a bond, note, or promise to any person who could promote his success: but a slight knowledge of human nature, or an experience of the world, would soon instruct us, that any person, even

* But where an engagement is entered into with the solemnities of a sealed instrument, it precludes the presumption of a want of due consideration, and no equivalent is necessary. This is called, *A special contract,* or *A contract by specialty.*

even a servant, who has access to a young lady, might make such an impression upon her mind, by bestowing unmerited praise upon one of her admirers, and depreciating the good qualities of another, as that she might easily be induced by such influence to give a preference to the least deserving, or be inveigled into a miserable marriage with a necessitous adventurer. And therefore all such engagements our law has wisely declared to be absolutely null and void. Lord Thurlow, in his argument upon Resignation Bonds, in the House of Lords, declared to this effect;—"That marriage-brokage bonds were not set aside, because they must be attended with fraud; for that certainly was not the case in Scott *v.* Hall, in Shower's Parliamentary Cases, which was a marriage between parties in every respect suitable to one another; and the bond was not set aside on account of any particular mischief in that case, but professedly because such a practice was full of great inconvenience; and the policy of law ought to prevent it, because the practice was *pravi exempli*†."

The case is the same with regard to bargains to purchase any public office; for though many of those contracts might be agreeable to strict abstract justice, yet the universal permission of them would be

† From a MS. Note.

be more injurious to society than the universal rejection. Lord Loughborough, speaking of one of them, observes,—" That this agreement resting on private contract and honour, may perhaps be fit to be executed by the parties, but can be only enforced by considerations which apply to their feelings, and is not the subject of an action. The law encourages no man to be unfaithful to his promises, but legal obligations are from their nature more circumscribed than moral duties*." It were endless to pursue this principle through all the branches of our jurisprudence in which it prevails. This will suffice to exhibit its nature and extent. It is, in truth, though it leads to different conclusions, the same principle of convenience and expediency, which is the only foundation of all the rules of private justice and abstract morality:—

Atque ipsa utilitas justi prope mater et æqui.†

But

* Henry Blackstone's Reports, p. 327.

† I have conversed with many pious divines, eminent preachers, and excellent classical and mathematical scholars, who have had the most erroneous notions of the usefulness and expediency of general laws, and of the science of moral and legal justice.

The errors they generally fall into, are the application of usefulness to the individual person, instead of benefit to all mankind; the application of usefulness of a single action, instead of the usefulness of the rule or law, to which all actions are to be conformable; and the supposition that every individual is

to

But those rules, which we learn by experience to be essential to the regulation of society, to distinguish them from the precepts of the moralists, we denominate *sound policy*, which is nothing more than another name for *good government*. And here I cannot forbear to mention, that it is the principle upon which Mahomet has prohibited all gaming, and the use of wine:—"They will ask thee concerning wine and games of hazard; say unto them, They are a great sin, but yet they are of utility to men, but the evil they cause is greater than the benefit they yield*." Though we do not find in the Korân that spirit of benevolence† which characterizes the Scriptures, yet in the legislation of the pretended prophet we frequently perceive the mind of a Hale or a Hardwicke.

If

to be his own judge, and the legislator of the rules of his own actions: for they might with as much propriety think that every one might be the framer of his own Acts of Parliament. Several of the first scholars of the age have approved of my explanation of this important subject, inserted in *Christian's Charges*, p. 316.

* Korân, chap. ii.

† It is a striking sentiment of an elegant historian, Mr. *Gibbon*, "That benevolence is the foundation of justice; since we are forbid to injure those whom we are bound to assist." Vol. V. p. 215. This is far better expressed in the Scriptures:—*Love*, or Benevolence, *worketh no ill to his neighbour; therefore love is the fulfilling of the Law.* It was unfortunate to the world,

If we examine the laws of evidence, we shall soon discover that they are established upon this grand and fundamental principle of sound policy; or that they are intended to be such as, (to use an expression of the mathematicians,) that the sum of justice may be a *maximum*, or rather the sum of injustice a *minimum*. They are fixed at that delicate point, which is best calculated for the conviction of guilt, and the protection of innocence.

Two learned and celebrated foreigners, Montesquieu and Beccaria, have censured our laws; because in an accusation of every crime, except treason and perjury, the prisoner may be found guilty upon the testimony of one witness. 'The witness who affirms, and the prisoner who denies,' say they, leave the proof *in equilibrio*; 'and it is necessary to have another witness, to make the scale preponderate*.'

I cannot

world, and to his own reputation, that that historian should have been a disbeliever in the divine authority of a work which I have employed my feeble pen to prove is the voice of Infinite Wisdom, and is itself an everlasting miracle.—See *Christian's Charges*, p. 333.

* Les loix qui font périr un homme sur la déposition d'un seul témoin, sont fatales à la liberté. La raison en exige deux, parcequ'un témoin, qui affirme, et un accusé, qui nie, font un partage, et il faut un tiers pour le vuider.—*Mont. l'Esprit des Loix*, liv. xii. ch. 3.

Piu

I cannot forbear to pronounce, that this is an idle trifling conceit, and unworthy of those who are ambitious of the title of Philosophers. The Law of England is established upon more solid grounds. Melancholy and deplorable is the instance, when an innocent man falls a sacrifice to the laws; but long experience has shewn the wisdom of the rule, and has proved that it is founded upon the surest basis,—the *salus populi*, or the safety of society.

The maxim, that it is better that a certain degree of guilt should escape, than that a proportion of innocence should suffer, has its limit.

Even the cautious Lord Chief Justice Hale fixes it only at five to one; "for it is better," says he, "five guilty persons should escape unpunished, than one innocent person should die*."

But

Piu d'un testimonio e necessario, perche fin tanto che un asserisce, ed áltro nega, niente v'è di certo, e prevale il diritto che ciascuno ha d'essere creduto innocente.—*Bec.*

These trifles please by their epigrammatic quaintness, and the neatness of the language in which they are expressed. If they deserved an answer, one might observe the balance is fallacious; for between him who has all to gain and nothing to lose, and him who has nothing to gain but all to lose, both here and hereafter, the odds are wonderful indeed!

* P. C. vol. II. ch. 38.

But in the barbarous times of our history, those whose opposition had excited the displeasure, or whose possessions tempted the rapacity of the Crown, were generally murdered by the sword of justice; as it was not difficult to find one perjured villain who would swear to the guilt of an innocent man. To remedy, in some degree, this enormous grievance, a law was enacted in the benign reign of Edward the Sixth*, which provided that no person should be convicted of treason but upon the evidence of two lawful witnesses: the Legislature at that time thinking that less injustice would be the consequence, if every traitor should escape, who might have been convicted by one fair witness, than if every innocent subject should be exposed to the perjury of one assassin.

Having thus premised that the protection of innocence is not less the object of the laws of evidence than the punishment of guilt, I shall now proceed to the consideration of that which is the immediate scope of this Dissertation; viz. to prove that these laws are invariably the same in all judicatures. And in the discussion of this question, I shall endeavour to produce such observations, arguments, and authorities, as will be as applicable to all future impeachments, as the present; except so

* 5 & 6 *Ed.* VI. c. 11.

so far as I shall be obliged to take notice of arguments on the other side, drawn from the peculiar circumstances of the present case. Indeed, I have rarely had an opportunity of attending the trial, and I have not perused any printed account of it: therefore, if any proposition, which I may have occasion to advance, should seem to bear a particular reference to what has passed in the present impeachment, it is imputable to accident, and not to design†.

All the reasons and authorities which I am about to produce, equally affect the defendant and the prosecutors. The partiality shewn to the former by the Civil Law is unknown to the Law of England.

In the Civil Law, there were various distinctions in favour of the defendant. Matthæus, a learned Professor

† No expression whatever is meant to be applied to the facts, or to extenuate or aggravate the circumstances of the present accusation. If I were intentionally to use any such expression, I should think myself guilty of a libel upon the public justice of the nation; but if any abstract proposition of law is advanced by the defendant, his Counsel, the honourable Managers of the House of Commons, the noble Lord who presides at the trial, or by the House of Lords unanimously, I conceive that I and every subject in this country have a right to examine it, and animadvert upon it with decency; and the only penalty we could incur, might be the imputation of presumption and absurdity.

Professor of the Civil Law in the University of Utrecht, tells us, *Inter crimen et innocentiam tres apud interpretes differentias reperio; Prima, quod accusator criminis probandi causâ testes non possit producere ad perpetuam rei memoriam, reus possit probandæ innocentiæ gratiâ. Secunda, quod crimen uno teste probari non possit, innocentia possit*. Tertia, quod crimen non probetur nisi per testes exceptione majores, innocentia etiam per testes minus idoneos, imò per quamlibet semiplenam probationem. Postremò, inter accusatorem et reum hoc quoque agnoscunt discrimen quod accusatori causâ cognitâ abolitio concedatur, et venia omittendi accusationem. Reo autem defensionibus suis renunciare non liceat, nec volenti perire concedatur.* Matthæus de Criminibus, Tit. xv. c. 7.

And Farinacius, in his *Tractatus de Testibus*, states, that *Regula est quod testibus ad favorem rei deponentibus magis credatur quam deponentibus ad favorem actoris, etiam quod dicti testes rei sint minus idonei.* Quæst. LXV. 5 Reg.

But these distinctions have never been introduced into the Law of England; for, far from shewing any favour to the defendant in the examination of witnesses, we can scarce hear without horror,

* This is true in our Law, in cases of treason and perjury.

horror, that the ancient law of this country did not permit him, when his life was in danger, to produce any witnesses whatever. And it was one good trait in the character of the sanguinary Queen Mary, that she first granted the indulgence to prisoners to call witnesses in their favour: but though by her own authority she directed the judges to receive their testimony, she could not empower them to administer an oath to the prisoner's witnesses; and as they were not sworn nor subject to the penalties of perjury, little credit would be given to their assertions: and it was not till the first year of Queen Anne that it was enacted, that, in cases of treason and felony, the witnesses for the prisoner should be sworn and examined in the same manner as the witnesses for the Crown*. But still, if an innocent man cannot prove his innocence by the strict rules of evidence, it is a misfortune which he must bear with resignation, and he can only hope for relief from the clemency of his Sovereign.

The Law of England, like the law of nature, acts by general, not by partial rules. It will not work a miracle, either for the protection of innocence, or extermination of guilt:—

"When

* 1 *Ann.* stat. ii. c. 9.

" When the loose mountain trembles from on high,
Shall gravitation cease, if you go by;
Or some old temple, nodding to its fall,
For Chartres' head reserve the hanging wall."—Pope.

And if there is a general law in this country, which can be supported by clear authority, that the House of Lords are not bound in cases of judicature by those rules of evidence which are adhered to in the other Courts, there is an end of the question; and reasons and abstract arguments to the contrary would be unavailing and superfluous. But I declare, that, in the extent of my reading, I have never met with the least suggestion to that effect.

In the argument which I alluded to at the beginning of this Dissertation, I understand the following authority was cited from the Rolls of Parliament:—

En ycest parlement, toutz les seigneurs si bien espiritels come temporels alors presentz clamerent come lour Libertee et Franchise, que les grosses matires moevez en cest parlement, et a movers en autres parlementz en temps a venir, tochantz pieres de la terre, serroient demesnez, ajuggez, et discus par le cours de parlement, et nemye par la Loy Civile, ne par la commune ley de la terre, usez en autres plus bas courtes du royalme: quell claym, liberte, et franchise

franchise le Roy lour benignement alloua et ottroia en plein parlement. 11 Ric. II. n. 7.

It is difficult to say what was the intent of this resolution of the House of Lords, confirmed by the assent of the King; but from the complexion of the times, it is probable it was to veil some proceeding which they were afraid would not bear examination. To be convinced that these were times of great violence, we need not travel beyond the records of Parliament; for in the twenty-first year of the same reign of Richard the Second, all the proceedings of the Parliament held in the eleventh year were declared null and void; but the transactions of the twenty-first were, in the first of Henry IV., rescinded and annulled, and those of the eleventh were again revived and re-established.

Allowing it then, as we must, to be a Parliamentary authority, let us consider its effect and import. It must be granted, that it signifies that the course or practice of Parliament may be different from the common law as administered in the inferior courts. But still it can only amount to a confirmation of a different practice, where from other evidence and authority it appears that a different practice prevails. We must therefore inquire in what instances the course of Parliament and the course of other courts vary. And it is certainly

certainly established by the cases of Lord Wintoun and Dr. Sacheverel, that the charge or crime need not be stated in an impeachment with the same degree of technical accuracy, or attention to the rules of special pleading, which are required by the law in all indictments.

In Dr. Sacheverel's case, it was determined, that by the law and usage of Parliament, in prosecutions by impeachment for high crimes and misdemeanours, by writing or speaking, the particular words supposed to be criminal are not necessary to be expressly specified in such impeachment: though all the Judges were of opinion they must be expressly stated in an indictment, and in an information*.

In Lord Wintoun's impeachment, the Lords decided it was not necessary that the treasonable acts should be stated to be done on a certain day, which cannot be dispensed with in an indictment; but they held, that stating them to be done *in or about the months of September, October, and November*, was sufficient in an impeachment†.

These authorities have been mentioned, in order to infer that the laws of evidence are not obligatory upon

* Har. St. Tr. vol. V. p. 828. † Ib. vol. VI. p. 50.

upon the House of Lords; but with all deference, in my opinion, they have a tendency to prove directly the reverse.

The principal object of the forms of special pleading, or of stating the charge with technical accuracy, was, and is still, to inform the court and the parties what was intended to be proved, that neither side might *travel out of the record*, and surprize the other with evidence which he did not come prepared to resist.

If then this is founded in reason, and there could be any variation in the laws of evidence, the principles of justice and the spirit of our law would require, that in proportion to the laxity of pleading in the statement of the crime, there ought to be a greater strictness and scrupulosity in the admission of the evidence to support it. It is remarkable, that in Lord Wintoun's case, Lord Cowper, who was High Steward upon the occasion, addressed Lord Wintoun thus:—"Your Lordship is the first that, on an impeachment for high treason, will have had the benefit of a good law, made in the first year of the late Queen, (since the Revolution,) whereby in all trials for high treason, as well as other capital offences mentioned in the Act, the witnesses produced on the part of the prisoner are to be examined on their oaths. So that your witnesses

witnesses will become entitled, in respect of the obligation under which they give their testimony, to the same degree of credit as the witnesses produced against you will be." This address of my Lord Cowper clearly proves that the House of Lords, previous to this time, in cases of judicature, followed the practice of the other courts, in not permitting the prisoners to be sworn.

The difference between the forms of Parliament and the general law of the land, has been well described by Lord Chief Justice Vaughan; for it is said, when he was a member of the House of Commons, he told them, "That they were not bound by the forms of law, but they were tied to the rules of law*." The laws of evidence are not the rules of any particular court; for when new jurisdictions are established, of which description were once the courts of *Nisi Prius* and courts of Quarter Sessions, no direction with regard to evidence need be given in the statute creating the new jurisdiction, unless a difference is intended; for the whole law of evidence will immediately attach upon that new judicature. The rules of evidence are essential to the manifestation of the crime; and as the crime is defined and limited by the law, so is the evidence, or the demonstration of the

* Har. St. Tr. vol. V. p. 66.

the crime; and there is as strong reason that evidence should be the same in all courts, as that the definition of the crime should be the same in all courts. Evidence differs from form, just as the demonstrations in Newton and Euclid differ from the language, print, and materials, in which they are communicated. Those demonstrations are a series of propositions eternally and universally true, whether they are written in Greek, Latin, French, or English, whether upon paper or parchment, in folio or duodecimo; so the laws of evidence, which are presumed to be the best and essential demonstrations of guilt or innocence, ought to be eternally and universally the same, whatever may be the forms by which the administration of justice is regulated. It is true, that in different nations the laws upon evidence will vary as much (or perhaps more) as the laws respecting crimes, or contracts, or any other subject of legislation; but still each country must suppose that its own system is the most conformable to the standard of reason, or to the result of their experience.

In the Civil Law, the *Regulæ*, *Ampliationes*, *Limitationes*, and *Sublimitationes*, and the various commentaries upon them, are swelled to dimensions which would far exceed those of all the English Statutes at large put together. Among these may be reckoned the voluminous and ponderous

derous treatises of *Farinacius de Testibus, Muscardus de Probationibus,* and *Menochius de Præsumptionibus**. They have a great variety of rules, which we have no knowledge of: for example,—*Regulæ sunt, quod inimicus contra inimicum non admittatur, nec amasius pro amasiâ; quod magis credatur testibus senioribus quam junioribus, clericis quam laicis, masculis quam fœminis, virgini quam viduæ, affirmantibus quam negantibus, etiam quod affirmantes sint laici, et negantes sint clerici,*—and ten thousand similar rules and distinctions, which the Law of England has thought it better to be without.

Besides that different nations will vary in the laws of evidence, the same country at different times will alter their laws upon that subject. If the best could be ascertained, they ought ever to remain invariable; and it is much to the credit of the English system of evidence, that it is confirmed by the experience of ages: it is almost entirely derived from times anterior to the most ancient of our statutes; for, except two or three alterations which

* The Commentary of Matthæus, in the Chapters *de Probationibus,* is the only book upon evidence, in the Civil Law, that I have had occasion to look into, which can be read with pleasure.

which have been made by Parliament, it is wholly founded upon the unwritten, or common law.

I am not so much in love with my subject, as to be blind to its defects, and not to be ready to acknowledge that our law of evidence is capable of great improvement. It is only necessary to mention a single instance.

If a sentence of excommunication is pronounced against any man for contumacy, or some trifling spiritual offence, the public justice of the nation is deprived of the benefit of his testimony, till that sentence is reversed. And the property, liberty, and life of an innocent man may be lost for want of the evidence of one, whose veracity by such a sentence, in the opinion of mankind, is not in the smallest degree contaminated; and whose word will pass for as much upon 'Change the day after the sentence is pronounced, as on the day before; yet, pending the existence of the sentence, in no court of justice can he be heard upon his oath.

Whatever policy there might be in this rule in ancient times, it has long since ceased; and it is now an obstruction to public justice in the temporal courts, without being any furtherance of it in the spiritual. But it is not the fault of judges or lawyers, that such a nonsensical ridiculous law

should exist: it is as irrevocable as fate, till it is abrogated by the united authority of the King, Lords, and Commons*.

Having endeavoured to distinguish between the forms of Parliament and of other courts, and the general law to which all of them must be subject,—and to prove that the authorities which have been referred to apply only to the special pleading, or the formal part of the administration of justice,—I shall now proceed to produce such positive authorities as I have been able to collect, and such arguments as my own mind has suggested, to support the proposition which I maintain, viz. That the House of Lords are bound by the same law of evidence which is received, or ought to be received, in all other courts. I say ought to be received in all other courts; for it must be admitted, that there are several decisions upon evidence, as upon every other subject, which are of equivocal authority, and may, perhaps with propriety, be questioned, both in the House of Lords and in every other court

* This was written in the year 1792; and in the year 1813 this objectionable law of evidence was removed; when it was enacted, by the 53 *Geo.* III. c. 127, that no sentence of excommunication shall be pronounced by the Ecclesiastical courts in cases of contempt or disobedience of their order, and that persons excommunicated shall in no case incur any civil penalty or disability.

court in the kingdom. If the four Judges of the respective courts of Westminster Hall were infallible, and never pronounced an erroneous decision, appeals, re-hearings, and writs of error, would cease to fill a considerable portion of our books. Points of evidence, upon which there is a diversity of opinion, can only be fixed and ascertained by the *dernier ressort*—the House of Lords. But what I advance is this, viz. That whatever the Lords, upon an appeal, would determine to be the evidence of the inferior courts, they are bound to declare that to be the law of evidence in their own court, in all judicial cases. Perhaps every Lord of Parliament is in the Commission of the Peace: whatever then any Peer, upon full consideration, and the best information, would pronounce to be evidence when he is acting by his own fire-side as a Justice of the Peace, or presiding at the Quarter Sessions, that, upon the most important and most solemn occasion in full Parliament, he is bound to declare to be evidence. We often hear it asked with a contemptuous tone of triumph, Shall the House of Lords, a tribunal erected by the Constitution, to try and condemn the Governors of Provinces, the Ministers of the Crown, and Princes of the Royal Blood, be bound by those paltry rules of evidence by which at the Old Bailey they convict a pick-pocket, or try at Hicks's Hall a petty assault and battery? But let us not be imposed upon by high-

sounding words, and an affectation of unmeaning mystery and sublimity. It matters not which court precedes; but they must follow each other, till they establish a permanent and invariable conformity. Nor is there any circumstance which can give us more satisfaction and delight, in contemplating the Law of England, than to be convinced that it pays no regard to rank or station; and that the life and liberty of a Prince and a porter are equally under its protection, and, when public justice demands it, are equally exposed to hazard and danger.

It will scarce, I presume, be asserted, that there is a difference in the law of evidence before the House of Lords in Parliament, whether the proceeding is by indictment or by impeachment; for in both cases all the Lords are the Judges both of law and fact; and every Peer for treason and felony may be either impeached or indicted. Nor do I imagine that it will be contended that there is a difference in the court of the Lord High Steward, in which the prosecution must commence by an indictment, and where the Steward is the sole judge of points of law and evidence, and the Peers are triers of fact only. Whether a Peer is tried upon an indictment in the court of the High Steward, or in the high court of Parliament, depends entirely upon the contingency of the sitting of Parliament:

Parliament: and it cannot reasonably be supposed, that whether a Peer is impeached or indicted in full Parliament for the same crime, his chance of conviction or acquittal should be altered; and therefore I conclude, in all these cases, that the evidence must be the same. Having never heard or seen any distinction suggested, I shall take that for granted; and shall mention those judicial cases in the two courts, in which I find points of evidence argued and decided upon the same principles which would have been the ground of decision in every inferior court.

In all cases of judicature before the House of Lords, it has been the ancient practice for the twelve Judges to be constantly present; and questions which arose upon evidence have always been referred to them for their opinions. From what sources they should draw their information, but from the *lucubrationes viginti annorum* in the Common Law, and their experience in the inferior courts, I can form no conjecture.

I see one of our learned Judges has, in fact, declared, that what is decided upon evidence in the House of Lords, in an impeachment, is an authority for the inferior courts; and consequently so far, if there is a consistency in the House of Lords, the evidence in both must be uniformly the same.

I mean

I mean Mr. J. Buller, who, in the last edition of the Law of *Nisi Prius*, in the chapter upon evidence, refers to Mr. Hastings's case before the House of Lords as an authority upon one point*.

In the case of the Earl of Somerset, who was tried for murder before the court of the High Steward, Lord Bacon calls evidence *the lantern of justice*†.

The first case that I shall mention, is that of the Earl of Bristol‡. On the 6th of February, 1626, the Earl was accused of high treason before the House of Lords in Parliament, by the King's Attorney General. On the 8th of May following, the Earl petitioned the House to move his Majesty to decline his accusation; being of that nature, that if it were well founded it could only be supported by the testimony of his Majesty, from conversations which had passed between the King and the Earl. On the next day the Lords proposed the following questions to the Judges, which they were desired to take into their consideration, and to deliver their opinions to the House:—

1st. Whether, in case of treason or felony, the King's testimony is to be admitted or not.

2d. Whe-

* P. 297. † Harg. St. Tr. vol. I. 351

‡ Vide Journals of the House of Lords.

2d. Whether words spoken to the Prince, who afterwards is King, make any alteration or not.

On the 13th of May, the day appointed for the Judges to deliver their opinions, the Lord Chief Justice informed the House, that he had received a message from Mr. Attorney General, viz. "That it was his Majesty's pleasure that we should forbear to give an answer to these general questions; but that in any particular case or question, which may arise in the course of the cause of the Earl of Bristol, and wherein the Lords desire our opinions, that, upon mature deliberation, we deliver the same according to our consciences. His Majesty assuring himself, that in all things we will deliver ourselves with that justice and evenness between his Majesty and his people, as shall be worthy of our places." But as the trial was not prosecuted before the Parliament was dissolved, I apprehend that no judicial answer has ever yet been given to these important questions.

But the whole of the conduct of the House of Lords, the Attorney General and the Judges, preclude all supposition that the House had any discretion with regard to the admissibility of the testimony of the King. And I should presume, that, for various reasons, no doubt can be entertained, even if the King alone should should see treason, murder,

murder, or any other committed, that neither in the House of Lords, nor in any other court in this kingdom, could he be admitted a witness to support a criminal prosecution*.

In the year 1631, the Earl of Castlehaven was tried before the court of the Lord High Steward, as a principal in assisting in a rape upon his own wife. And one question referred to the Judges was, "Whether the wife in this case might be a witness against her husband for the rape. The answer was, She might: for she was the party wronged; otherwise she might be abused. In like manner, a villain (vassal) might be a witness against his Lord in such cases†." The legality of this answer has been controverted; but, from its generality, it is evident that it was not intended to be confined to the court of the Lord High Steward‡.

In

* Three reasons may be briefly stated. He would be a witness in his own cause; he would be interested in the forfeitures and fines; and he would be exempt from the penalties of perjury. 2 *Hale* P. C. 282.

† Har. St. Tr. vol. I. 387.

‡ In all cases now, where the crime is a violence done to the person of the other, the husband may be evidence against the wife, and the wife against the husband. This was held by all the Judges, in the case of Jagger, who was convicted at York, upon the evidence of his wife, of an attempt to poison her.—*Spring Assizes*, 1797.

In 1699, the Earl of Warwick was tried upon an indictment before the House of Lords, for the murder of Richard Coote, Esq.: he offered, in his defence, a witness who had been convicted of manslaughter, in killing the deceased Coote, but who had not been burnt in the hand, nor obtained a pardon under the great seal, though the pardon had actually passed the privy seal. The Lords, far from thinking they had any discretion to admit him, if he was not legally competent, referred his case to the consideration of the Judges; who were unanimously of opinion that he was an inadmissible witness, upon which he was immediately rejected*. No case can be imagined of greater hardship, or where the letter of the law could be more repugnant to reason and substantial justice. From the rejection of this evidence, the Earl might have been found guilty of the foul crime of murder. He was convicted of manslaughter; and if he had had the benefit of this person's testimony, he might perhaps have been honourably acquitted. The distinction was absurd and disgraceful in the extreme; for one would have supposed, that if he had been branded in the hand, his condition would have been more infamous, and his testimony less worthy of credit: but an Act of Parliament having declared that no one convicted of felony should be admitted a witness until he had obtained his Clergy and had been

* Harg. St. Tr. vol. V. 170.

been burnt in the hand, this statute equally operated upon all courts, the highest and the lowest; and this monstrous absurdity, so shocking to one's feelings and understanding, could only be extinguished by the authority of the Legislature, from which it had originated.

But it continued to be the law of this country from the 18th year of Queen Elizabeth to the 19th year of his present Majesty's reign*.

This

* 18 *Eliz.* c. 7.—19 *Geo.* III. c. 19.

I have expressed myself strongly in the text against the distinction; but yet all Judges and all courts must adopt it, till a change is made by the Legislature. The reason of such incongruities can easily be assigned, by tracing the history of the law.

By the common law, every conviction and judgment of treason or felony rendered the person attainted incapable of giving evidence in a court of justice.

The Clergy claimed an exemption from all punishment by the temporal Judge, and claimed also the same privilege for every person who could read, *(qui legit ut clericus,)* and for as many murders, manslaughters, robberies, and larcenies, as they should commit.

This, by the 4 *Hen.* VII. c. 13, was, in the case of laymen who could read, confined to the first conviction for felony, and the offender was burnt in the hand. But still he was claimed by the Clergy, and he was tried again by them in an absurd manner; and if he obtained a purgation, which he seldom failed to do, he was restored to his credit, and could give evidence, and purchase lands.

The 18 *Eliz.* c. 7. alludes to this, and enacts, That no one shall

This witness was rejected by the House of Lords, at a time, when, if he had been admitted, he would not have been sworn; for when Lord Mohun the next day was tried for the same murder, the Lord High

shall be delivered as usual to the Ordinary; but after Clergy allowed, and burning in the hand, he shall be delivered out of prison.

But the statute provided he may be imprisoned one year longer: Lord Hale has said—"If a man be convict of felony, and prays his Clergy, and is burnt in the hand, he is now a competent witness; for by the statute of 18 *Eliz.* c. 7, it countervails a purgation and a pardon, and he is thereby enabled afterwards to acquire goods.—Hob. 288. Searle and Williams." 2 *Hale* P. C. 288.

It follows then, as a clear legal deduction, that no one convicted of felony can be a witness in any court, unless he has been burnt in the hand, or has obtained the King's pardon.

Except that, by the 4 *Geo.* I. c. 11. for grand larceny, the Judge, at his discretion, for burning in the hand may substitute transportation for seven years.

By the 19 *Geo.* III. c. 74, for every other Clergyable felony the court may, at their discretion, for burning in the hand substitute a fine, or whipping not more than three times; except, a person convicted of manslaughter cannot be whipped.

In all these cases the substituted punishment has the same effect as burning in the hand.

It follows then, after transportation for grand larceny, or after whipping, or the payment of a fine, for any other felony, or in general after suffering the punishment, the offender may be admitted as a witness, but not before. These are unanswerable legal conclusions, which Justices, Judges, House of Lords, and Lord High Stewards, are equally bound to admit.

Petty larceny is a species of felony, and the person convicted of

High Steward addressed his first witness thus: "Though you are not upon your oath, yet you are as much obliged in justice and conscience to speak the exact truth, as if you was upon your oath; therefore have a care what testimony you give." When this noble Lord had the misfortune to be tried for the murder of William Mountford, a few years before, the Marquis of Carmarthen, the Lord High Steward, thus addressed him: "My Lord, you are a very young man, and therefore it is to be hoped you cannot so early have had your hands in blood; and the same reason, because you are so young,

of it was rendered infamous or incompetent to give evidence. The punishment by the common law was whipping, and imprisonment to any extent, at the discretion of the court.—By the 4 *Geo.* I. c. 11, the court may either whip or transport for seven years; but in this case the convict of petty larceny always remained incompetent; so that a gentleman making a will to devise real property, called, as one of the three credible witnesses, a servant who had lived in his house many years with credit, to attest the will. The testator died, and his heir discovered that this servant many years before had been convicted at the Quarter Sessions of petty larceny,—some trifling theft. In consequence of this, the will was declared void, which induced Lord Alvanley to bring in an Act (the 31 *Geo.* III. c. 35), by which it is enacted that no person shall be incompetent in consequence of being convicted of petty larceny.

So it is a common practice, when a prisoner is so convicted, to produce him as a witness against the receiver of the stolen goods. But in that case the receiver can only be indicted for a misdemeanour, and the witness's evidence ought to be corroborated, as in the case of an accomplice.—*Note to Second Edition.*

young, may perhaps make you conceive that you are under some greater disadvantage in making your defence than you would be, if your experience had been longer: but to remove any misapprehension you can have of that kind, it is very proper to put your Lordship in mind, that you have the good fortune to be tried for this fact in full Parliament, where no evidence will be received but such as must be manifest and plain, beyond all contradiction, so that you have nothing to fear here but your own guilt*."

At the trials of the Earl of Warwick and Lord Mohun, for the murder of Mr. Coote, Lord Somers presided as Lord High Steward. Though he was the principal author of the Revolution, yet that great lawyer never adopted the modern new-fangled false distinctions between the Law and the Constitution; but he addressed the Earl of Warwick in the following elegant and emphatic language. "Your Lordship is called upon to answer this charge before the whole body of the House of Peers assembled in Parliament. It is a great misfortune to be accused of so heinous an offence; and it is an addition to that misfortune, to be brought to answer as a criminal before such an assembly, in defence of your estate, your life, and honour: but it ought to be a support to your mind, sufficient to keep

* Har. St. Tr. vol. IV. 512.

keep you from sinking under the weight of such an accusation, that you are to be tried before so noble, discerning, and equal Judges, that nothing but your own guilt can hurt you: no *evidence* will be received but what is *warranted* by law; no weight will be laid upon the evidence, but what is agreeable to justice." Here that illustrious character nobly discriminates between the admissibility of evidence warranted by law, and that discretion and substantial justice which each was bound to exercise and discharge, according to the effect and operation of that evidence upon his conscience.

In Lord Macclesfield's impeachment, the Counsel for the noble Earl called a witness to prove what he had heard thirty-five years ago, from a person who was dead. The managers objected to the evidence; upon which the Earl of Macclesfield, who had lately been Lord Chancellor of Great Britain, observed:—"My Lords, what we are giving evidence of, is of a thing transacted thirty-five years ago; the parties are all dead: he is about to give you an account of what he did, and was said to him at that time by his master in transacting that affair. If that person that said it were now alive, to be examined to it himself before your Lordships, it would not be evidence without examining him; but if dead, what he said concerning this fact may be given in evidence: it is concerning the party's

own

own act, and what he told him at the time it was doing. Therefore we hope they will not oppose this evidence, which, in the nature of the thing, is all that possibly can be now given." Lord Trevor rose, and observed, "If there be a difference in opinion between the noble Lord and the managers, they must withdraw: I will tell my opinion, that such an hearsay evidence is no evidence*." Upon which it was no longer persisted in. But in this case, where the noble Earl and his Counsel were making experiments, there is not the least intimation that the House of Lords were not bound by the rules of the inferior courts.

In the Duchess of Kingston's trial, upon an indictment before the high court of Parliament, two points of evidence were determined, and by several learned Lords were argued upon those principles which are common to every court in the kingdom: one was, that a surgeon who obtains any information, even of the most delicate nature, as of the birth of a child in consequence of his profession, has no privilege, but is bound to disclose it in a court of justice: another was, that a noble Lord, to whom the most confidential communications had been made, could not, from any etiquette of honour, or motives of delicacy, be protected from revealing them, as far as was necessary

* Har. St. Tr. 644.

necessary for the purposes of justice. And when the Counsel shewed a willingness not to wound the feelings of the noble Lord, and to wave the testimony, Lord Radnor declared, "I am afraid your Lordships, by your acquiescence, have admitted a rule of proceeding here, which would not be admitted in any inferior court in the kingdom. I desire therefore to ask the noble Lord, whether he knows any matter of fact relative to that marriage." Lord Barrington answered, "My Lords, if I do, I cannot reveal it, nor can I answer the question without betraying private conversation." But after some debate, that noble Lord was obliged to disclose all the private conversation which he remembered upon the subject*.

It is related of Xenocrates the Athenian, that so high was his character for honour and veracity among his countrymen, that when he was produced as a witness, the judges would not permit him to be sworn: but this is a compliment which cannot be paid by any English court of justice†. Our maxim is, *In judicio non nisi juratis creditur*. And though the Constitution reposes such confidence in the

* Har. St. Tr. vol. XI.

† Athenis aiunt, quum quidam apud eos, qui sanctè graviterque vixisset, jurandi caussâ ad aras accederet, (ut mos Græcorum est,) unâ voce omnes judices ne is juraret reclamasse; quum spectati viri noluerint religione videri potius, quam veritate, fidem esse constrictam.—*Cic. Oratio pro Balbo.*

the purity and integrity of the Peers, as to permit them to give their verdict upon their honour, yet in their own House, and in every other court, they must give their testimony upon oath. Lord Barrington was sworn in the Duchess of Kingston's trial, and the Bishop of Oxford in Lord Macclesfield's *.

I have

* If any Peer should embrace the tenets of the Quakers, it would be very clear, that in no inferior court, in a criminal case, could he be heard upon his honour or affirmation. It has been determined, after much solemn argument, that though the evidence of an Atheist cannot be received,—as the religious solemnity of an oath can have no obligation upon his mind,—yet the evidence upon oath of men of every religion, who believe in a Supreme Being, or a Governor of the Universe, may be received in an English court of justice, and that the oath may be administered according to the ceremonies of their religion. Upon the authority of this decision, I conceive there could be no doubt but the deposition of a Gentoo might be received in the present impeachment. The decision is that of *Omychund* v. *Barker, in* 1 *Atkyns's Reports*, 21; where it appears, that pursuant to an order of the Court of Chancery, of the 4th of *December* 1739, a commission went to the *East Indies;* and on the 12th of *February* 1742, the Commissioners certified, that, among other witnesses for the plaintiff, they had examined *Ramkissenseat* and *Ramchurnecooberage*, and several others, subjects of the Great Mogul, being persons who profess the Gentoo religion, and that they were solemnly sworn in the following manner; viz. "The several persons being before us, with a Brahmin or Priest of the Gentoo religion, the oath prescribed to be taken by the witnesses was interpreted to each witness respectively; after which they did

I have now enumerated all the questions upon evidence which I have found discussed in trials before the House of Lords; and I have stated them, in order to shew that they have been determined upon those general principles of law which prevail in every other court in the kingdom; and that in none of those important cases is there any suggestion that the Peers possessed a discretionary authority with regard to evidence.

In the eighth year of William III. a bill of indictment for high treason was found against Sir John Fenwick: but before he was brought to trial, one of the witnesses, upon whose evidence before the Grand Jury the bill was found, disappeared, so that Sir John Fenwick must necessarily have been acquitted in any court of law. But a Bill of Attainder was passed, in which it was enacted, that Sir John Fenwick should be subject to all the penalties of a conviction in a court of justice, and in consequence

severally with their hands touch the foot of the Brahmin or Priest of the Gentoo religion, being also before us with another Brahmin or Priest of the same religion; the oath prescribed to be taken by the witnesses was interpreted to him; after which *Neenderam Surmah*, being himself a Priest, did touch the hand of the Brahmin, the same being the usual and most solemn form in which oaths are most usually administered to witnesses who profess the Gentoo religion, and the same manner in which oaths are usually administered to such witnesses in the courts of justice, erected by letters-patent of the late King at *Calcutta*."

consequence of this Act of Parliament he suffered death. In the examination of witnesses before the House of Commons, previous to the passing of the Bill, there was great debate, whether the House was bound by the rules of evidence. The speeches of the principal speakers are preserved in the fourth volume of the State Trials: among these is that of Mr. Methuen, who, I have no doubt, is Paul Methuen, Esq., who was afterwards Queen Anne's ambassador to Lisbon, and who concluded an important treaty with Portugal; he was also high in office in the next reign of George the First. The speech which is assigned him, proves him to be a man of great abilities, and deserving of the character which is given him in the dedication of the seventh volume of the Spectator.

He distinguishes between Bills of Attainder, and cases of judicature in Parliament, by observing, that "'Tis said you are trying of Sir John Fenwick, that you are Judges, and that you are both Judges and jury, and that you are obliged to proceed according to the same rule, though not the methods of Westminster Hall,—*secundùm allegata et probata.* But the state of the matter, as it appears to me, is, that you are here in your legislative power, making a new law for attainting of Sir John Fenwick, and for exempting his particular case, and for trying of it, (if you will use that word,

though improperly;) in which case the methods differ from what the law requires in other cases; for this is never to be a law for any other afterwards. Methinks this being the state of the case, it quite puts us out of the method of trials, and all the laws that are for limiting rules for evidence at trials in Westminster Hall *and other judicatures:* for it must be agreed, *the same rules of evidence* must be observed *in other places* as well as Westminster Hall, *I mean Impeachments*, and it has always been so taken*." Here then is the express authority of a man of learning and talents, and which was not contradicted by any gentleman that followed him. And it would have been of great importance to those who adopted that side of the debate, to have corrected him with regard to impeachments and cases of judicature; for if the two Houses of Parliament are not bound by the rules of evidence in judicial proceedings, *à multo fortiori argumento*, they would not be bound in their legislative characters†.

I have

* Har. St. Tr. vol. IV. 310.

† In this original Dissertation, the object of the author was only to prove that the House of Lords was bound, in cases of judicature, by the same rules of evidence as in the inferior courts.

In the Appendix, I shall endeavour to shew, that when witnesses are examined, in either House, to affect the rights and honour of an individual, the same rules of evidence precisely ought to be observed.

I have now stated all the authorities which I have met with in the course of this investigation; and I have never any where discovered the least intimation that the House of Lords could deviate from the rules of evidence observed by other courts, except in an impeachment which perhaps the generality of my readers will be best acquainted with;—I mean the impeachment of Quinbus Flestrin, the Man Mountain, intended to have been tried in the High Court of Parliament of Lilliput. After an impeachment was resolved upon, and articles drawn up against Quinbus Flestrin, for having extinguished the flames in the Empress's apartment in a manner which, by the laws of Lilliput, amounted to high treason; he was secretly informed of it by one of his party in the Cabinet, who added, "That his sacred Majesty and Council, who are your judges, were in their own consciences fully convinced of your guilt, which was a sufficient argument to condemn you to death, without the formal proofs required by the strict letter of the law." Though there can be little doubt but Swift intended this humorous impeachment as a satire upon some of the impeachments which were numerous in the reign of Queen Anne, yet I conceive that this part of his wit was unprovoked, and that no thought had ever occurred to the managers of those impeachments to dispense with the formal proofs required by the strict letter of the law.

But

But notwithstanding the two Houses of Parliament have deviated from the rules of evidence, in passing Acts to deprive the subject of his life and honour, yet it is now the constant and invariable practice of both Houses of Parliament, in every Divorce and Turnpike Bill, to examine witnesses according to the law of evidence. One of the Counsel for the Bishop of Rochester cites a memorable and noble instance of the Lord Digby, and which clearly proves what evidence he thought ought to be adduced to support an impeachment. I shall repeat the words of the learned gentleman, Mr. Wynne. "Lord Digby had been one of the most violent managers in the impeachment of the Lord Strafford; and yet, when that proceeding was waved, and a Bill of attainder brought in, he spoke as violently against it. Though he was still of opinion (he said) that that Lord was the same dangerous Minister, and great apostate to the Commonwealth, who must not expect to be pardoned in this world till he was dispatched to another, yet he had rather lose his hand than put it to that dispatch. He put them in the mind of the difference between prosecutors and judges; and how unbecoming that fervour was in them, now they were judges, which perhaps might be commendable in them as prosecutors. That when he gave his consent to the accusation, he was assured his crimes would have been fully and *legally* proved; which if they had, he could have condemned him with

with innocency, as he had prosecuted him with earnestness: but as the case then appeared, no man could satisfy his conscience in the doing of it. The Parliament, it is true, had a judicial and legislative capacity: the measure of the one ought to be legally just, the other political and prudential: but these two capacities were not to be confounded in judgment; they were not to piece up (says he) the want of legality by matters of convenience, to the ruin of a man by a law made *ex posteriori.*"

I think an argument has been urged, from the peculiar circumstances of the present impeachment, which is something of this nature; viz. that where the crimes have been committed at so great a distance from the place of trial, and when so great an interval of time has elapsed, if you should expect the same strict proofs as in ordinary cases, the greatest criminals might escape with impunity. Protesting, as I ever shall, that the laws of evidence are as unextendible and incompressible as adamant; but granting, for the sake of argument, that they could admit of a variation, I should contend, and I trust with success, that, from the reason assigned, the conclusion ought to be directly the reverse; and that the spirit of both English law and English liberty, under such circumstances, would demand their restriction, rather than their relaxation. For, according to the principles

principles of our law, caution and scrupulosity ought to be shewn, in the admission of evidence, in proportion to the difficulty which the defendant has to repel it, if it is fabricated. This is the principle, as I have mentioned before, of all statutes of limitation; which provide, that after a certain time no evidence whatever shall be admitted to affect the defendant. And the same reason which induced the Legislature to enact, that no subject should be convicted of treason but upon the testimony of two witnesses, induced them also to declare, that no one should be prosecuted for any treason, except for an attempt to assassinate the King, unless he is indicted within three years after the commission of the crime*.

Lord Chief Justice Hale strongly urges attention to this principle in the trial of rapes. "It is true," says he, "rape is a most detestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembered, that it is an accusation easily to be made, and hard to be proved, and harder to be defended by the party accused, though never so innocent.

"I shall never forget a trial before myself of a rape in the County of Sussex.

"There

* 7 *Will.* III. c. 3.

" There had been one of that county convicted and executed for a rape in that county, before some other Judges, about three assizes before, and I suppose very justly: some malicious people seeing how easy it was to make out such an accusation, and how difficult it was for the party accused to clear himself, furnished the two assizes following with many indictments of rapes, wherein the parties accused with some difficulty escaped."

He then relates a case which happened at the second assizes following,—(it is rather too long to give the whole of it in his own words,)—" Where an ancient wealthy man, of about sixty-three years old, was indicted for a rape, which was fully sworn against him by a young girl of fourteen years old, and a concurrent testimony of her mother and father and some other relations. The ancient man, when he came to his defence, alleged that it was true the fact was sworn, and it was not possible for him to produce witnesses to the negative; but the prisoner then convinced the court and jury that he had long laboured under a disorder which rendered him perfectly incapable of committing a crime of that nature." Lord Hale then relates other similar cases; and observes, " I only mention these instances, that we may be the more cautious upon trials of offences of this nature, wherein the court and jury may with so much ease be

imposed

imposed upon, without great *care and vigilance*; the heinousness of the offence many times transporting the judge and jury with so much indignation, that they are over-hastily carried to the conviction of the person accused thereof, by the confident testimony, sometimes of malicious and false witnesses*."

What my Lord Chief Justice Hale recommends in these cases, is equally applicable to every other species of accusation, viz. That the *care and vigilance* of the court ought to be greater, according to the ease of fabricating evidence, and the difficulty in repelling it†. But besides this shield which justice, with a parental care, spontaneously presents against the designs of wickedness, perhaps some caution might be necessary to check a natural propensity in the mind of man to magnify whatever we know imperfectly, or where we have no fear of contradiction. This, though perhaps a commonplace observation, seems to have been a favourite sentiment of one of the most comprehensive minds of antiquity; I mean Tacitus. *Ut quis ex longinquo revenerat, miracula narrabant, vim turbinum,*

* P. C. vol. I. 636.

† There is one melancholy instance in an impeachment, where a venerable Peer, Lord Stafford, lost his life by the perjury of Titus Oates and his infernal associates.

turbinum, et inauditas volucres, monstra maris, ambiguas hominum et belluarum formas. An. II. 24.

Cuncta, ut ex longinquo, aucta in deterius adferebantur. An. II. 82.

Juvit credulitatem nox, et promptior inter tenebras affirmatio. Ib.

Gnarus majora credi de absentibus. Hist. II. 83.

Omne ignotum pro magnifico. Vita Agric. 30.

These authorities, I trust, will suffice to convince us that we ought not to supply by imagination the deficiency of legal evidence; and that it is not consonant either to justice or sound reason, to extend the laws of evidence, or to be content with a slighter degree of proof, because the scene of action is laid in India. But, to obviate the complaint of the want of the best evidence in trials for crimes committed in India, the Parliament has provided, by an Act passed in the thirteenth of the present King, that the Speaker of the House of Commons, or the Chancellor, may send a Commission to India for the examination of witnesses, and that depositions obtained in consequence shall be good evidence in any Parliamentary inquiry in this country.

We

We frequently hear it observed, that it is the law of England, that when you cannot obtain the best evidence, you shall receive the next best evidence which the nature of the case will admit. This certainly is the law of England. But it signifies nothing more, than that if you have not the best *legal* evidence, you shall resort to the next *legal* evidence. Evidence may be divided into primary and secondary, but the secondary evidence is as accurately defined and limited by the law as the primary; but you shall never resort to hearsay, to interested witnesses, to copies of copies, &c. &c. because from no circumstances whatever can they ever become legal evidence: if there are exceptions, they are such as are as much recognised by the law as the general rule; and where boundaries and limits are established by the law for every case which can possibly occur, it is immaterial what we call the rule, and what the exception.

With regard to the present Impeachment, I have heard an argument of this kind advanced, that though our rules of evidence may be very fit and proper to try a murder, rape, robbery, or a single action, they are perfectly unavailing and inapplicable when the whole history of a man's life is put in issue; and that this is a case far beyond the comprehension of the contracted vulgar minds of lawyers. By thus enveloping the argument in a mystery,

mystery, which we have no power to penetrate, if it does not give pretensions to a victory, it at least prevents the disgrace of a defeat: it brings to one's mind those heroes in Homer, who, when they are hard pressed, are carried from the field by some guardian Deity, wrapt in a cloud. But as far as I can comprehend the premises of this argument, I should again draw a different conclusion, and should reply upon that obvious principle which I have mentioned before, that the less prepared a defendant can be to repel an attack, the more scrupulous and circumspect ought his judges to be, in their attention to the attempts of the assailant. But without resorting to this observation, which probably will be treated with contempt, as a principle of special pleading, I should contend, that, with respect to the law of evidence, it is perfectly immaterial whether one act or ten thousand acts are put in issue. The history of a man's life is a continuation of single acts; and each act must be proved by the same description of evidence, as if upon that act alone depended the acquittal or conviction of the defendant. Whether it is the immediate criminal act, or an act which affords an inference or presumption of guilt, the proof must be exactly the same. If we are to prove that the prisoner rode a white horse (or any other similar circumstance) the same day on which a robbery was committed by a highwayman mounted on a white

white horse, we must prove it precisely by the same description of witnesses and evidence as we must prove the act of robbery itself. So if we ransack the history of a man's life, whatever actions we bring forward, whether criminal in themselves or inferences of criminality, these must all be proved by the same sort of evidence. If we are to prove that he issued a murderous mandate, like King Tarquin, by cutting off the head of a poppy, we must prove that act by precisely the same evidence by which we should have proved that he cut off the head of a man: perhaps it might require some additional facts or circumstances to explain it, or to shew that it was the cause of the criminal effect.

What I have advanced so far upon circumstantial evidence is this, viz. That facts, from which guilt is to be inferred, must be established by the same species of evidence as the immediate or principal acts of criminality; but the inference to be collected from those facts must be left, in every court, to the judgment and consciences of those, whose province it is to pronounce upon the guilt or innocence of the party accused. Mr. Baron Mounteney, in summing up the evidence in the trial between James Annesley, Esq. and the Earl of Anglesea, makes this observation: "I remember to have heard it laid down, by one of the greatest men who ever sat in a court of judicature, viz. That circumstances

were

were in many cases of greater force, and more to be depended upon, than the testimony of living witnesses."—" Witnesses, Gentlemen, may either be mistaken themselves, or wickedly intend to deceive others : God knows, we have seen too much of this in the present cause, on both sides. But circumstances, Gentlemen, naturally and necessarily arising out of a given fact, cannot lie*."

We hear this observation everywhere echoed; " Circumstantial evidence is the best ; for circumstances cannot lie." But if we would give ourselves the trouble to bestow a little consideration upon the subject, I think we shall be convinced that circumstantial evidence is not the best, and that circumstances can lie. There are circumstances which cannot lie, where the conclusion or inference is necessary and unavoidable ; but where the conclusion or inference is contingent, circumstances may lie, that is, we may draw an erroneous conclusion from the given facts. The learned Matthæus clearly describes this distinction : *Argumentum porrò necessarium vel contingens est : necessarium, cujus consequentia necessaria est, veluti coivisse eam quæ peperit : contingens, cujus consequentia probabilis est, veluti cædem fecisse, qui cruentatus est ; Atalantam virginem non esse, quod cum*

* Har. St. Tr. vol. XI. 426.

cum adolescentibus spatietur sola per sylvas. In the first case, one fact is a certain demonstration of the other; but in the second, the circumstances must frequently lie, when they charge with murder a person stained with blood, or Atalanta, from such companions and conduct, with a want of chastity. But he proceeds to observe; *Contingentia verò quanquam singula fidem non faciant, plura tamen conjuncta crimen manifestare possunt. Rem uno atque altero exemplo declarabimus. Occisus est Kalendis Mævius: Titius perempti inimicus fuit; eidem sæpius non solum interminatus, sed et insidiatus est. Cum deprehenderetur iisdem Kalendis in loco cædis cruentatus, cum gladio cruento, ad mensuram vulneris facto, toto vultu expalluit, interrogatus nil respondit, trepidè fugit. Hìc singula quidem argumenta infirmiora sunt, universa tamen cædis auctorem Titium evidenter designant, rectèque Duarenus dixit, non dubitaturum se hunc reum carnifici jugulandum dare.* Tit. xv. c. 6. Yet Duarenus might have condemned and executed an innocent man. Every one of these circumstances must be proved by positive witnesses, who may be either wicked or mistaken; but even if they are pure and correct, the conclusion we draw from the facts disclosed may be erroneous.

So that, in circumstantial evidence, there must, of necessity, be more chances for error than in positive

positive evidence. If any number of witnesses should swear they saw the prisoner draw a reeking sword from the side of a dead man, we have not the same degree of certainty that he either murdered or killed him, as if the same witnesses had sworn they had seen him run it through his body. It affords a violent presumption, but still it might have been the friendly act of an innocent man, who had accidentally passed that way after the murder was committed: or even if it was the prisoner's own sword, it might have been snatched from his side and plunged into the body of the deceased by some one who had escaped; or the deceased might have borrowed it, and have fallen upon it himself. All human testimony is nothing more than a high probability; and it is true that circumstantial evidence in one case may produce a higher degree of it, or may more nearly approach to certainty, than direct and positive evidence in another*. Human testimony

* That both positive and circumstantial evidence may fail, will appear from the following cases. The first is in the Chronicle of the Gentleman's Magazine for Oct. 1772. The other is from the fifth volume of Causes Célèbres, p. 438, where several more trials of the same nature are related.

Sept. 14, 1772. Came on at the sessions in the Old Bailey, the trial of one Male, a barber's apprentice, for robbing Mrs. Ryan, of Portland-street, on the highway, on the 17th of June last. The witnesses swore positively to the identity of the lad, and the whole court imagined him guilty. He said nothing in

 his

testimony is so far distinct from certainty, that it admits of all the degrees of probability, and by some

his defence, but that he was innocent, and his evidences would prove it. His evidences were the books of the court; to which reference being made, it appeared that on the day and hour when the robbery was sworn to be committed, the lad was on his trial at the bar where he then stood, for another robbery, in which he was likewise unfortunate enough to be mistaken for the person who committed it; on which he was honourably acquitted.

Voici un autre fait, dont j'ignore l'époque, et qui m'a été transmis par la tradition. Avant qu'on eût rebâti cette longue suite de maisons qui bordent la place Saint Michel à Paris, en fâce de la rue Sainte Hyacinthe, une marchande veuve et âgée occupoit, au même endroit, une petite boutique, avec une arrière boutique, où elle couchoit. Elle passoit, dans le quartier, pour avoir beaucoup d'argent amassé. Un seul garçon composoit, depuis long-tems, tout son domestique. Il couchoit à un quatrième étage, dont l'escalier n'avoit point de communication avec l'habitation de sa maîtresse; il étoit obligé, pour s'y rendre, de sortir dans la rue; et lorsqu'il s'alloit coucher, il fermoit la porte extérieure de la boutique, et emportoit la clef, dont il étoit seul dépositaire.

On voit, un matin, la porte ouverte plutôt qu'à l'ordinaire, sans qu'on remarquât aucun mouvement qui annonçât que la marchande, ou son garçon fussent levés. Cette inaction donna de l'inquiétude aux voisins. Cependant on ne remarque aucune fracture à la porte: mais on trouve un couteau ensanglanté, jetté au milieu de la boutique, et la marchande assassinée dans son lit, à coups de couteau. Le cadavre tenoit, dans une main, une poignée de cheveux; et dans l'autre une cravate Auprès du lit, étoit un coffre qui avoit été forcé.

On

some philosophers has been considered according to the mathematical principles of the doctrine of chances

On saisit le garçon de boutique ; il se trouve que le couteau lui appartient. La cravate que tenoit la marchande étoit à lui. On compare ses cheveux avec ceux qui étoient dans l'autre main; ils se trouvent les mêmes. Enfin la clef de la boutique étoit dans sa chambre ; lui seul avoit pu, moyennant cette clef, entrer chez la marchande, sans fracture. D'après des indices ainsi cumulés, et si concluants, on lui fait subir la question ; il avoue, il est rompu.

Peu de tems après, on arrête un garçon marchand de vin, pour je ne sçais quel autre délit. Il déclare, par son testament de mort, que lui seul est coupable de l'assassinat commis à la Place Saint Michel. Le cabaret où il servoit étoit attenant à la demeure de la marchande égorgée. Il étoit familiérement lié avec le garçon de boutique de cette marchande ; c'étoit lui qui mettoit ordinairement ses cheveux en queue ; quand il peignoit, il avoit soin de ramasser ceux que le peigne détachoit, et dont il avoit peu-à-peu formé la poignée qui s'étoit trouvée dans les mains du cadavre. Il ne lui avoit pas été difficile de se procurer une des cravates et le couteau de son camarade, et de prendre, avec de la cire, l'empreinte de la clef de la boutique, pour en fabriquer une fausse.

To this note in the first edition, I now think it proper to make the following addition :—

In the Morning Herald of the 27th of September 1820, the following case is stated as having occurred in Ireland. A servant of a bleacher had stolen property from a bleaching-ground, to a great extent. The master offered one hundred pounds reward to any one who could discover the thief. The servant, to obtain the hundred pounds reward, and to remove all suspicion from himself, borrowed a penknife from a young man in the

 neighbourhood ;

chances and combinations. In the second volume of the Miscellanea Curiosa, the first Paper (said to be

neighbourhood; then invited him to come to see him in the night, and persuaded him to bring his father's lantern, to light him home. The poor young man so came; and after supping with him, the designing villain told him that he had left accidentally his penknife in the bleaching-ground, and explained to him exactly where he might find it, on his return home.

The unsuspecting young man went as he was directed; but the servant immediately informed his master that some one was going with a light to the bleaching-ground. They followed with guns, and as the young man was stooping for the knife, he was shot dead. A web of cloth being half cut through with the young man's own knife, which was known in the neighbourhood to be his; his father's lantern also being known; and cloth and yarn being placed in heaps, ready to be carried away; constituted such a concurrence of circumstances, that no one doubted but this innocent young man had been deservedly shot.—It was not stated how the real truth was discovered.

Such diabolical machinations no administration of justice can ever entirely extirpate. But to the honour of English Judges and Juries, I have never heard of the execution of any man found guilty upon circumstantial evidence, where it could be proved afterwards that he was innocent. If it did sometimes so happen, it would do no discredit to our laws and Government. I have been sorry to see lately, that those who wish to degrade every part of the Law of England, insinuate or assert that it is unjust and cruel to condemn men to punishment upon circumstantial evidence. All human testimony, positive or circumstantial, never can amount to absolute certainty, but only to that degree of probability which is called moral probability. I presume it is so called, because wise and

good

be written by Dr. Halley) is entitled, *A Calculation of the Credibility of Human Testimony;* in which that

good men think it *morally* right to act upon it. Infinite mischief and ruin would result, if we turned loose again upon society all murderers and malefactors, who could only be brought to punishment by circumstantial evidence. We must all act to the best of our knowledge and judgment for the protection of others and ourselves: we must not sit still, as Dr. Johnson is said to have done, in a state of lowness of spirits, declaring that he would not walk across the room for fear he should kill a fly.

What I have said respecting the execution of an innocent man, must be confined to modern times; for Lord Chief Justice Hale has related some such cases which had existed in his time: and he observes upon them, "I would never convict any person of murder or manslaughter, unless the fact were proved to be done, or at least the body found dead, for the sake of two cases" which he relates, where the prisoner in each was found guilty and executed, and the person charged to be murdered afterwards appeared and gave an account of his absence. 2 *Hale* P. C. 290.

I cannot conclude this note without animadverting upon the highly reprehensible manner in which several Clergymen conduct themselves, in pressing, almost torturing, prisoners, before execution, to confess their crimes. I should advise them to confine their pious exhortations and influence to prepare the convicts for the government of another world; but not to injure greatly the government in this, by inducing the unthinking multitude to believe that *he* must have suffered wrongfully, who at the last moment persisted in declaring his innocence, after so many urgent importunities to lead him to confess his guilt. This ought to have been placed at the end of the Note

Another

that learned philosopher shews, that if we could determine the probability of the credit of each witness,

Another interesting case of that kind I have read, though I am unable to inform the reader where it is to be found. But the circumstances stated were these. A gentleman, who lived near Epping Forest, was guardian to his niece, a young lady of great fortune; to which, upon her death, he was entitled to, as her heir or next of kin. They were seen walking together into a very lonely part of the forest: he was seen there dragging her upon the ground; and she was heard, in a beseeching voice, to say, "My dear uncle, do not kill me! do not kill me!" The report of a gun was soon afterwards heard near the place. The uncle returned home without his niece, giving no satisfactory account of her disappearance. He was tried for the murder of her, found guilty, and executed.

The niece sometime afterwards returned, and gave this true account of the whole transaction.

She was in love with a young man, whom her uncle would not give his consent that she should marry: she walked into the forest with him, went down upon her knees to supplicate his consent: she used the words proved, she held fast his hands, and he, to disengage himself, dragged her upon the ground: when they were separated, he returned hastily to his house: she saw a gamekeeper immediately afterwards kill a woodcock; and she ran down a path to a place where her lover, by agreement, was waiting with horses; which conveyed them to an English port, where they embarked for Holland, and had no opportunity of hearing of the uncle's trial before their return to England.

This case probably existed before Lord Hale's Pleas of the Crown were published, recommending no conviction before the body of the deceased was found.

If

witness, the sum or product of the whole testimony of witnesses, or the probability of the guilt or innocence of a prisoner, would be a strict and mathematical calculation. One proposition clearly demonstrated by those principles, is, that the weight or probability of human testimony, given any degree of credibility to the witnesses, rises in a much higher ratio or proportion than the number of the witnesses: so that where the probability of the truth of each witness is to the probability of his falsehood, from error or corruption, as 9 to 1; if there are two, of that degree of credit, it is 99 to

If the body of the deceased had been found, and she had been shot by some other man after her uncle had left her, he could have had little chance of an acquittal, even from the most cautious and discreet Judge and jury of the present times.

The best apparent evidence may be delusive and fallacious: a theft can seldom be proved by an eye-witness; and a very great proportion of depredations would be committed with impunity, if the parties charged were not convicted upon circumstantial evidence. The strongest and most usual presumption is the recent possession of the stolen property, not answered by proof that the party became possessed of it honestly.

But there is a memorable case in Holy Writ, where this presumption failed; viz. the discovery of Joseph's cup in Benjamin's sack: but the authority of the case also proves that wise and good men at that time acted upon such a violent presumption of criminality.

to 1, that their testimony is true, or that they are not both wrong; if three, 999 to 1, and so on. So if fifty such witnesses should concur, the probability of their testimony would be a number expressed by 50 nines to 1; and that such great odds should lose, would by many be regarded as a greater miracle than if the sun should appear at midnight, or the dead be raised to life*. Some ingenious

* Mr. Hume's celebrated argument against miracles seems to me to amount to nothing more than his own assertion, that if any number of men whatever should tell him they had seen a miracle, he would not believe them. But a religious mind would be more inclined to think that the Creator of the Universe might, for wise purposes, suspend or reverse the ordinary operations of nature, than that ten thousand men should concur in a falsehood.—*First Edition.*

The stupendous work of the Creation required an inspired writer to describe it; and all beyond what he has taught us, is too vast for the mind of man to comprehend. But we all have lived but a few years in this world, before we clearly perceived, that in every year there is a Power or Conservator, who works a miracle for the preservation of the human species. We have sometimes extreme heat, sometimes extreme cold, extreme rain, or drought, and many other extremes, where we are all convinced that a little more would end in the destruction of the race of man; but when we apprehend that the ship is just going to strike upon a rock, where all embarked in it must inevitably perish, we find that there is an invisible almighty pilot at the helm, who steers us again from the impending danger, into the main ocean of safety and comfort.

How this has been effected, no astronomer, chemist, or human scholar, has yet been able to teach us.

The

ingenious friends of mine, accustomed to disquisitions of this nature, have drawn this conclusion from these principles, viz. That no degree of negative testimony merely can ever totally destroy the probability of affirmative testimony: as, for instance, if one man asserts a fact, and another of equal credit denies it, some probability remains on the side of the affirmative; as if one should affirm that *A* had a legacy by a certain will, and if another should assert he had read the will, and that there was no legacy for *A*, yet before *A* himself saw the will, upon this testimony he would give something for his chance. If we should suppose that the holder of any ticket in the lottery is informed by two men, each of whom is as much in the habit of telling lies as truth, so that it is an even chance what each asserts is true or false, and if one should declare that he heard that ticket called a prize of 1000*l.*, the other that he heard it called a blank; from this testimony the chance of that prize would be worth 250*l.* Or if we suppose that,

The Mahometan writers surpass us Christians in their expressions of reverence and veneration for the Creator. One celebrated Poet has said, "If you were to endeavour to recount all the blessings you have derived from your Creator, even till the day of judgment, you could not mention one in a thousand." And in another place:—"The sun, the moon, the stars, the clouds, are all employed to produce you bread; therefore, O man, do not eat it with ingratitude."—*Sâdi.*

that, from the morning of a certain day, an underwriter would insure a ship at a premium of ten per cent., but that he was afterwards informed by two sailors, each of whose credibility we will estimate at an even chance as before; by one, that on that day he saw the ship spring a leak and sink; by the other, that he sailed in company with that ship all the day, and that he left her in the evening safe and well;—(here I preclude the supposition that both are correct with respect to the fact, but one mistakes the day;)—though these two testimonies are directly opposite, yet they by no means cancel each other, but they produce such an effect, that if the underwriter is a man of prudence and calculation, he would not afterwards insure that ship for less than $32\frac{1}{2}$ per cent*. The demonstration of the solution of these cases I must leave to those who have an acquaintance with the principles, and a disposition to be amused by such speculations. But it must be admitted,

* The higher the probability of each of such opposite testimonies, the more nearly they will cancel each other, or less effect will be produced. But negation merely can never totally destroy affirmation: the effect of an affirmation can only be cancelled by an affirmation of something of a directly opposite nature. If two persons, equally credible, should assert, one that *A* had lost 1000*l.*, the other that *A* had won 1000*l.*, then *A*'s situation would be of the same value it was before; and gamesters and underwriters would not object to *stand in his shoes.*

admitted, as we cannot with any degree of certainty appreciate the credit of each witness, they are of little or no use in practice, though they are undeniably true in abstract theory. But science built upon a firm foundation, when properly considered, never can be at variance with good sense. The most honourable acquittal leaves some unfavourable presumption; for if the person tried should have the misfortune to have one or two more such acquittals for the same crime, it cannot be affirmed that that person will stand as clear from suspicion, as if he never had been tried at all; therefore some probability must remain in favour of each accusation, for the sum of any number of nothings would still be nothing†.

It is so much the general understanding of mankind that no evidence amounts to certainty, that the most conscientious witnesses in all times have been inclined to qualify their testimony by belief. The witnesses of the present day perpetually *believe*, where they entertain no doubt: and Cicero tells us, *Veterum in testimoniis dicendis ea fuit diligentia ac religio, quod inscientia multa versaretur in vita, ut, arbitrari*

† In looking into the Civil Law books, I find in Farinacius, Quæst. LXV. n. 201. "Plus (inquiunt Doctores) creditur duobus affirmantibus quam mille negantibus:" and Muscardus calls this, Regula illa vulgaris, vol. I. conclu. 70.

arbitrari se, testes dicerent, etiam quod ipsi vidissent. Lib. IV. Acad. Quest.

In the consideration of circumstantial evidence, I have stated that the circumstances must be proved by living witnesses or positive testimony: but there is a species of testimony which is called the *evidentia rei:* though this must be introduced by positive evidence, yet, when produced, it speaks for itself, and requires no explanation. Of this nature may be mentioned two cases which have happened, within a few years, upon the Northern circuit. In one case, a person was found shot by a ball; and the wadding of the pistol stuck in the wound, and was found to be part of a ballad called *Sweet Poll of Plymouth,* which corresponded with another part found in the pocket of the prisoner. The other also was a case of murder; and in the head of the deceased there was a chip or splinter, which exactly fitted the cavity in a bludgeon, from which a piece had been lately broken; which bludgeon the prisoner carried in his hand when he was apprehended. Though this account of the two pieces of the ballad, and two pieces of the bludgeon, must be proved by positive testimony, yet the court and jury are as competent judges of the fitness and correspondence of the parts as the witnesses. *Cui adsunt testimonia rerum, uid opus est verbis?*

These

These were certainly strong corroborations of other circumstances; but if they had stood alone, they would have deserved little consideration; for if the ballad and the bludgeon had been thrown away by the murderers, they were objects likely to draw the attention of an innocent man, who would naturally have put one in his pocket, and have carried the other in his hand*.

Mr.

* An accomplice may be admitted a witness against a prisoner indicted for a crime; but he is only admitted in a case where there is not sufficient evidence to convict both, or all, without his testimony. But as he is swearing to save himself, or, as it is said, with a halter about his neck, which he might be disposed to slip off, and put about the neck of the first innocent man he met, all courts of justice direct the jury to acquit the prisoner, unless the evidence of the accomplice is confirmed or corroborated by some material testimony from a witness free from all suspicion. The law is the same at the Quarter Sessions as at the Assizes; but as Justices of the Peace frequently mistake what is a circumstance to confirm the evidence of the accomplice, I will explain it by a case which actually happened to myself, several years ago, when I attended a Quarter Sessions where very experienced Magistrates presided. I had a brief for the prisoner, and an accomplice was produced as a witness: he proved that the prisoner and himself resolved to rob the warehouse of the prosecutor, which was a room up stairs; for that purpose they took a ladder from a neighbouring yard; they placed it against the window of the room, they took out a pane of glass, opened the casement, and went in; they took several articles, some of which they put into a green bag; but being alarmed, they made their escape;

Mr. Justice Blackstone says, that "light or rash presumptions have no weight or validity at all†." This

escape, and left the green bag behind them, containing various articles which he particularly described. Several witnesses were called to prove that there was a ladder in the place the accomplice stated, that it had been removed to the prosecutor's warehouse, that a pane of glass was taken out, the window found open, and a green bag and every thing was proved exactly as the accomplice had described. I, as counsel for the prisoner, suggested to the court that all this was no evidence of corroboration with regard to the prisoner; it proved no connexion with the prisoner; it affected him no more than any other man; it would be equally true if any gentleman at the bar or upon the bench had been indicted;—

—— Mutato nomine, de te
Fabula narratur.

But the Justices, with one voice, declared, that they had never heard so clear and satisfactory a corroboration. The prisoner was found guilty, and transported.

All this would have been true, if the witness had committed the crime alone, or with any other man. I state this particularly for the use of Justices of the Peace. Though I do not find this distinction made by the best authors upon evidence, yet I have great confidence that it will be approved by the Judges. In a late case of a sheep-stealer, tried before myself at Ely, an accomplice was called, who stated that he and the prisoner went to the prosecutor's field on a certain night and at a certain hour; they caught a sheep, they dug a hole, they stabbed the sheep, and let the blood run into the hole; they skinned the sheep, and took out the entrails; the skin and the entrails

† Vol. III. 371.

This, I humbly conceive, is not quite correct: singly, they ought to have no validity upon the mind of the court; but every circumstance which affords a presumption, however light, must be received: though it adds but a drop to the ocean, it will have validity according to its weight; and a number of such presumptions may become of importance, or, in the words of Matthæus, *Possunt diversa genera ita conjungi, ut quæ singula non nocerent, ea universa tanquam grando reum opprimant.*

By these general observations upon the nature of positive and circumstantial evidence, I may perhaps be thought to have wandered from my subject; but I make this application of them, that whatever is

entrails they concealed in a certain part of a ditch, and hid the knife. Witnesses were called, to prove that every thing was found as this witness had described.—I held this evidence was no confirmation: but a respectable witness proved that he was out that night; it was moonlight, and he could clearly distinguish the witness and the prisoner together, going from their homes towards the prosecutor's field:—*that*, I told the jury, was a circumstance of the strongest confirmation, and upon that they found the prisoner guilty.

In the horrid and sanguinary conspiracy of Thistlewood and his associates, accomplices were called to state the design and plan; but they were confirmed by their being all found with arms a short time before the conspiracy was to be carried into execution, and by various other circumstances: so that the conclusion of no trial was ever so satisfactory to all mankind.

is abstractedly and mathematically true in one place, must be so also in another; and that to assert that Peers and Commoners should have different rules of evidence, would be as great an outrage against all science and good sense, as that they should reckon by different rules of arithmetic.

But something of this kind has been advanced, That ordinary rules may be invariably observed in ordinary cases; but cases of extraordinary enormity of guilt, from their very nature, ought not to be limited and confined by rules which were only intended for common occurrences. Here again I should draw directly the contrary conclusion *; and should contend, if the law would admit of restriction or relaxation, that the evidence ought to be more strict in proportion to the magnitude of the accusation. In this I am fortified by an authority pregnant with good sense; though I do not know to whom to ascribe it, having omitted to mark the reference when I extracted it; but it wants not the sanction of a name. "It is a common but well-founded maxim, that in proportion to the greatness of a crime, ought the strength of

*. Being obliged to draw a different conclusion from every argument that I have yet heard, I should suspect myself of prejudice or perverseness, if I did not find that [illegible] was supported [illegible]table authorities.

of the proof of it to be. The higher a crime is, and the deeper it draws its consequences, so much the clearer and stronger ought the evidence of it to be."

Whatever is more rare and extraordinary, either in the actions of mankind or the appearances of nature, will require so much stronger proof to induce us to believe its existence. When an incredible story was related at Rome, it was a proverbial saying, "I should not believe it, though Cato should assert it." It requires proof of a higher nature to convince us that a woman of the age of fifty-one, like Lady Jane Douglas, had been delivered of twins, than that such an event had happened to a young woman of the age of twenty-one or thirty-one.

It perhaps may be observed, that the Peers, from their superior education, might safely be entrusted with evidence which it would be dangerous to relate in the hearing of a jury; that their enlarged and enlightened minds would more easily discriminate the reality of truth from what bore but the semblance of it. Education, it is true, in this country is regarded as one of the best ornaments of nobility, and it is one of the first advantages of fortune to be able to purchase it in the greatest perfection. But as men of rank and

fortune generally associate with those who are above the temptation of admitting even a thought of fraud and design, they are less experienced in the artifices of the world, and become liable to be imposed upon in proportion to the superior purity and integrity of their characters:—

"For oft tho' Wisdom wake, Suspicion sleeps
At Wisdom's gate, and to Simplicity
Resigns her charge; for goodness thinks no ill,
Where no ill seems." MILTON.

But notwithstanding these benefits from education and situation in life, yet it must be admitted that the minds of a Peer and a Commoner are formed by the same hand, and constructed of the same materials. In the inferior courts, a prisoner or defendant may object to, or challenge, such a number of the jury, as to be almost secure that he is tried by his peers, who are *omni exceptione majores*, and who are brought from the neighbourhood, in order that they may be acquainted with the credit and characters of the witnesses. But in the House of Lords no challenge can be admitted; and every Peer who has not been pronounced *non compos mentis* under a writ of *De idiotâ inquirendo*, or a commission of lunacy, may decide upon the estate, life, and honour of an English subject. And high and reverend as the law deems the honour of a nobleman, and as far as ambition and human passions

passions will admit, it may be exempt from suspicion and reproach; yet it will scarce be thought *scandalum magnatum*, if we should suppose that there are few impeachments where the defendant would not wish the absence of many of his judges, or that others might be substituted in their room. In the inferior courts, the law of evidence is the most essential part of that great bulwark of our liberty, the *judicium parium*, or the trial by jury. Each juryman is solemnly sworn, that he will a true verdict give, and a true deliverance make, according to the evidence. Break down the barriers of evidence, and the security of that trial is gone. Though it is a common observation, that the mind of man is fond of authority, yet the Lords will check this propensity in extending the admissibility of evidence, when they consider that they are more particularly the objects of trial in their own court, and that by such extension each might perish by his own law; or as it has been said of Bills of attainder, that, like Sisyphus's stone, it might roll back upon their own heads. The impeachment of a commoner before the Lords may be considered in the same degree the *judicium parium*, as the trial of a Peer by a jury. The Lords, if not impeached, in all cases of misdemeanour, as for libels, perjury, &c. must be tried like a commoner before a jury; and the authorities are strong, that a commoner never can be

impeached before the House of Lords for any crime higher than a misdemeanour.

If the House of Lords could deviate from the rules of evidence by a hair's breadth, they might leave them at an infinite distance. There can be no medium. For who shall fix and determine, when they shall decide according to the law, and when by their will and pleasure? Every thing would be debated and voted; and what was admitted in the evening might be rejected in the morning. If a father and a son, a Peer and a Commoner, were engaged in the same treason, murder, or capital crime, they would be tried by different proofs, and perhaps meet with different fates. The Lords might even surpass Dionysius in refinement in tyranny, and might condemn to death the wife or the son of a king upon the testimony of a dream. Indeed, one of our Queens, Anna Boleyn, was convicted of high treason, in the Court of the Lord High Steward, upon evidence not much better*.

Articles

* One of the charges against this unhappy Queen was, that she had said, "That the King never had had her heart;" a declaration, if it was made, in which probably there was more truth than discretion: but this was adjudged to be high treason, in slandering her issue, according to an Act of Parliament made a short time before for her honour and protection.

Articles of impeachment were prepared against another of our Queens, Catherine Parr; but by her dexterity and address she baffled the designs of her enemies. The Law of England has no respect of persons; and it surely will not deny to a Queen Consort, and the Royal Blood, those blessings of liberty and justice which it secures to the meanest negro servant. If the Peers should disregard the laws of evidence, they might condemn to death upon the testimony of copies of copies of forged and fabricated originals, the hearsay of hearsay, the *voces ambiguæ*, the tales of old women, or the prattle of children: they might resort to what has been so eloquently described by a great master; *Sermonem sine ullo certo autore dispersum, cui malignitas initium dederit, incrementum credulitas, quod nulli non etiam innocentissimo possit accidere fraude inimicorum falsa vulgantium*†. The sanctuary of the faithful bosom of a wife might be violated, who might be dragged into court, and tortured to disclose the confidential and sacred conversations with her husband. What could prevent them from introducing even the rack itself? It forms a considerable branch of the Civil Law, and the laws of other nations. There is one ready in the tower; where, for the glory of our law and country, it

† Quintilian, lib. V. c. 3.

it is exhibited among those monsters which are foreign and unnatural to our climate *.

They

* Mr. J. Foster takes notice, that the rack has been mentioned in the Court of the High Steward; "For," says he, "at the trials of the Earls of Essex and Southampton, the Attorney General, Sir Edward Coke, extolleth the great clemency of her Majesty towards the conspirators, *that none of them were put to the rack or torture;* and acknowledgeth the goodness of God towards her, and his just judgment upon the prisoners, that the truth had been revealed by the witnesses without rack or torture of any of them. A strain of adulation, to say no worse of it, nauseous and sordid, highly unbecoming a gentleman of the Profession, especially one who well knew, and hath informed his readers, that any kind of torture in that case would have been utterly illegal." P. 244.

But such is the delicacy, or rather justice of our law, that it will not receive a confession which has been obtained either by the torture of hope or fear. The principle is the protection of innocence; and it arises from an apprehension, that under the influence of promises or threats, a man might be induced to declare himself guilty when he is perfectly innocent. I know no instance by which this can be so aptly illustrated, as a case put by one who was well acquainted with the springs of human nature, and whose mind was not meanly imbued with the principles of the English law. I mean the author of Tom Jones.—When poor Partridge was tried before Mr. Allworthy for infidelity to the marriage bed, and a confession was produced against him by his wife, "Partridge still persisted in asserting his innocence; though he admitted he had made the above-mentioned confession, which he however endeavoured to account for, by protesting he was forced into it by the continued importunity she used, who vowed, that as she was sure of his guilt, she would never leave tormenting him till he had owned

They might even adopt that maxim of enthusiasm, *Credo, quia impossible est.* If there were no bounds and restraints, a rabble of evidence, of every unprincipled denomination, would rush into the House of Lords, to support such eloquence as perhaps Rome and Athens never heard.

It is sometimes asked, If the Court of Chancery does not admit different rules of evidence from those which are observed by the courts of law? Nothing is more erroneous than the general vulgar notion of a court of equity: and it differs from the other courts, as they in a great degree differ from each other, in its forms and jurisdiction. But the Chancellors of the present time disclaim all discretion: they cannot indulge their own notions of justice and equity, but are as much chained down by maxims, forms, and precedents, as the other Judges in Westminster Hall. And with regard to evidence, we have the authority of Lord Hardwicke, "That

owned it; and faithfully promised, that, in such case, she would never mention it to him any more. Hence, he said, he had been induced falsely to confess himself guilty, though he was innocent; and that he believed he should have confessed a murder from the same motive." Book II. c. 6.

And the event of this trial affords a striking instance, and it seems to have been the moral intended by it, where, from not adhering to the legal rules of evidence, an innocent man is condemned to shame and ruin by a righteous judge.

"That the rules, as to evidence, are the same in equity as at law; and if *A.* was not admitted as a witness at the trial there, because materially concerned in interest, the same objection will hold against reading his deposition here." And again, "The rules of evidence in this court, as to witnesses, are exactly the same as at law*."

Even in the Court of Star Chamber, the most arbitrary and detestable of all courts, the Judges did not exercise any discretion with respect to evidence; but the testimony of witnesses was admitted and rejected according to the general law of the land, as it prevailed in the courts of Westminster Hall†.

Some prosecutions before the Roman Senate, perhaps, may be considered as analogous to impeachments before our High Court of Parliament: but if we were to examine the accusations preferred before that grave and august assembly, I am inclined to think that we should never find that the prosecutors requested the judges to dispense with the legal proofs, or rules of evidence. At least, for this opinion I have the authority of one learned Civilian,

* 1 Atkyns's Rep. 453. and 2 Ibid. 48.

† Vide Hunter's History of the Star Chamber, lately published in the Collectanea Juridica, No. VI. p. 205.

Civilian, Matthæus, who observes, that *Verres quoque quam apertè Siciliam depopulatus fuerit, omnibus notum fuit, tamen et accusator et probationes legitimo constituto judicio exierunt**. And we have the authority of Cicero himself, who concludes his first Actio against Verres, by declaring, *Dicimus Caium Verrem, cum multa libidinosè, multa crudeliter in cives Romanos atque in Socios, multa in Deos hominesque nefariè fecerit, tum præterea quadringenties sestertium ex Siciliâ contra leges abstulisse. Hoc testibus, hoc tabulis, privatis publicisque auctoritatibus ita vobis planum faciemus, ut hoc statuatis, etiam si spatium ad dicendum nostro commodo, vacuosque dies habuissemus, tamen oratione longâ nihil opus fuisse.* By alluding to the accusation of Verres, it is far from my intention to insinuate either a parallel or a contrast between the Governor of Sicily and the Governor of India. It would ill become me to publish a single reflection either in favour or to the prejudice of any defendant pending a public trial. I appear only as an advocate for the Law of England: and, I conceive, I and every Englishman have a right to say, that if either a subject or an alien should come to England with all the guilt of India accumulated upon his head, or concentrated in his heart, he is entitled to the benefit of our

* Prolegom. cap. 4.

our laws, and that we ought not to hunt him like a tiger.

I have now taken notice of every material authority which I have been able to discover, after some degree of diligence, which I felt myself challenged and stimulated to exert, by the attention which was paid to what I advanced upon a former occasion. If there are any authorities upon this question which I have not enumerated, I must take shame to myself, and confess my ignorance;—a confession which I should think less dishonourable than the imputation of wilful concealment from the public.

All that I have been able to collect I can contemplate with satisfaction, and with a confident hope that I shall be acquitted of a reprehensible degree of rashness, for having declared what had been urged respecting the discretion of the House of Lords, *a monstrous doctrine:* and I trust I may now be permitted to conclude, that it is totally repugnant to that liberty and justice which are secured to us by almost every part of our government, but more peculiarly by the law of evidence, which I feel myself unequal to describe in such clear and strong language as has been used by Lord Cowper, when he says, "The wisdom and goodness of our laws appear in nothing more remarkably,

remarkably, than in the perspicuity, certainty, and clearness of the evidence it requires to fix a crime upon any man, whereby his life, liberty, or his property, can be concerned. Herein we glory and pride ourselves, and are justly the envy of all our neighbour nations. Our law, in such cases, requires evidence so clear and convincing, that every by-stander, the instant he hears it, must be fully satisfied of the truth and certainty of it. It admits of no surmises, innuendoes, forced consequences, or harsh constructions, nor any thing else to be offered as evidence, but what is real and substantial, according to the rules of natural justice and equity*."

* St. Tr. vol. X. 52.

Observations *upon some* Questions *of* Law *which have arisen in the House of Lords, pending the Bill of Pains and Penalties against the* Queen *of* England.

The preceding Dissertation was written by me more than twenty-eight years ago, and not three words of it have been changed: it cannot therefore be imputed to me that it was composed to serve any purpose in the present times; and the last page of it was returned by the Printer on the very day that I had read in the Newspapers that a question had been put by the Counsel for the Illustrious Defendant to a witness called by him, which was objected to because it was urged that it was not such a question as the laws of evidence would permit to be put in any Court of Justice. But it was argued by several Peers, that the House of Lords upon this occasion were not bound or *fettered* by the same laws of evidence which other Courts were bound by; and that whatever was the opinion of the Judges upon the legality of the question, they were resolved to vote that it should be

be put and answered. After the observations contained in the last pages of the Dissertation, which neither the Honourable Mr. Burke, who had produced them, nor any other person had attempted to answer,—and from the confirmation of the author's approbation of them by twenty-eight years of no inconsiderable attention to such subjects,—it may be supposed that I read with some surprise the following sentences, attributed to Peers distinguished by the highest reputation, for honour, learning, and talents.

"Analogies drawn from the practice of Courts of Justice had nothing to do with the present case: those Courts never had to decide such a cause as this, and therefore their Lordships were not tied and fettered by those rules."

"With regard to fixed rules, circumstances might occur, in which it would be injustice to abide by them."

"Under all the circumstances of the present case, it was right that the narrow rules of the Courts below should be here extended."

"On those grounds, whatever the opinion of the learned Judges might be, he thought the usual rules should be enlarged."

"To act with a safe conscience, he could not act otherwise than as he had done, and should vote for the question being put."

The

The Judges were of opinion that the question ought not to be put: but the Peers who had expressed themselves according to the above extracted sentences were not obliged to do what they had declared they had resolved to do, viz. To vote that the question should be put, because the Counsel for the prosecution waved the objection, and consented that the question should be put.

It may, I think, with great propriety be questioned, whether the Judges in any case, either civil or criminal, ought to permit a question to be answered, though by the consent of both parties, which is not a legal question. How is the Judge to make any just or legal observations upon questions which have no legal validity or existence? and how can the jury return a true verdict according to the evidence, where the evidence is not legal evidence.

The law of England makes no distinction of persons or parties, plaintiff or defendant, prosecutor or prisoner; and though a prisoner is permitted to relate whatever he pleases in his defence, yet whatever he attempts to prove, it must be admitted only according to the strict rules of evidence. There can be no medium, there can be no distinction, between a hair's breadth and an infinite distance.

Lord Bacon has well described the laws of evidence

evidence as the lantern to justice: and it is absolutely necessary that we should all use the same lantern, and view the objects with the same optics, the same rays of light,—or infinite confusion would inevitably be the consequence.

If some, instead of this lantern, were to use concave mirrors, some convex, some telescopes, microscopes, solar microscopes, or magic lanterns, the same object would to the sight assume an infinity of variations of form; what is remote would appear close to us, and what within our reach would seem remote; mites would be magnified to monsters, and monsters would be diminished to mites; beauty would be deformity, and deformity beauty; in short, every thing would be seen through a false medium, or would be inverted, and turned upside down.

But though all may admit that the rules of evidence must be invariably the same in all Courts of judicature, both in the highest and in the lowest, yet it has been powerfully contended, by men of great learning and talent, that it is not necessary that there should be a strict observance of them in a Bill of Pains and Penalties. It was argued with great dignity, gravity, and eloquence, in the case of Sir John Fenwick, who was charged with treason, and executed upon a Bill of Attainder in the

the 8th year of the reign of Queen Anne, 1710; and afterwards in the 9th of Geo. I. 1723, in the case of the Bill of Pains and Penalties against Dr. Atterbury, Bishop of Rochester, who was charged with a treasonable correspondence in favour of the Pretender: he, by the Bill, was deprived of his Bishopric, and was banished for life.—See the State Trials, and the Journals of each House of Parliament.

It is remarkable, that each of these Bills was commenced in the House of Commons, and were both supported by those who were the friends and promoters of the Revolution, and who were considered the violent Whigs of the times. The supporters of these Bills argued and voted, in majorities, that the two Houses of Parliament, when they inflicted punishment by an Act of the Legislature, were not bound by the laws of evidence. In the Bill of Attainder in which Sir John Fenwick was tried for his life, they even admitted the declarations or hearsay of the wife against her husband.

One of the members of the House of Commons, who opposed such evidence justly, though somewhat ludicrously, observed, that a departure from the law of evidence must inevitably introduce every species of *twittle twattle*.

I have endeavoured to prove, that, in the manifestation of guilt or innocence, there never can be a deviation from the established law of evidence, but it must be productive of absurdity and injustice. There is no other law to refer to; and every one will be left to act upon, or to prove to others, the phantoms of his waking or sleeping imaginations. Every thing may be decided by a majority of dreamers of dreams*. Each might adopt, in support of his vote,—

Sic volo, sic jubeo; stat pro ratione voluntas.

In Hume's History of England, vol. IV. p. 416, we find that St. John, Solicitor General to Charles the First, advanced the following most indecent and revolting sentences in his speech: "That though the testimony against Strafford were not clear, yet, in this way of Bill, private satisfaction to each man's conscience was sufficient, even should no evidence at all be produced; and that the Earl had no title to plead law, because he had broken the law. It is true, (added he,) we give law to hares and deer, for they are beasts of chase; but it was never

* It is very extraordinary, that the perpetrator of a shocking murder in Lancashire was brought to justice a few years ago in consequence of a dream. The dream led to the discovery of the facts sufficient to convict the prisoner, but the dream was not proved or even mentioned in the Court.

never accounted either cruel or unfair to destroy foxes or wolves, wherever they can be found; for they are beasts of prey."

But what becomes of the law of the poor innocent deer, if its enemies fix upon it the dreadful appellation of a wolf? For the honour of the present times, the Tory doctrine in the time of Charles the First, and the Whig doctrine in the reigns of Queen Anne and George the First, have been banished from the House of Lords; and nothing has been advanced against the Illustrious Defendant, but what has been well considered by the Judges of the present day, and which, though the Judges may sometimes err, future Judges will, in all probability, approve and adopt, as the established law of England for ages past.

If the laws of evidence were not strictly adhered to, nothing would be more odious, more repugnant to wisdom, justice, and liberty, than Bills of Attainder, and Bills of Pains and Penalties.

Nihil est crudelius, nihil perniciosus, nihil quod minùs hæc civitas ferre possit.

Proscriptionis miserrimum nomen illud, et omnis acerbitas Sullani temporis, quid habet, quod maxime sit insigne ad memoriam crudelitatis?

*Opinor, pœnam in cives Romanos sine judicio constitutam**. Cic. Orat. pro Domo suâ, c. 17.

Cicero qualifies his condemnation of them by the words *sine judicio*; which I think may be correctly rendered, "A trial by legal evidence."

Magna Charta, the solid basis of the venerable fabric of the English Constitution, has clearly and strongly provided, that no free Englishman shall be deprived of any right, *nisi per legale judicium parium suorum, vel per legem terræ*. The judgment of, or trial by, equals must be legal; which it never can be, if it is not the inevitable conclusion from legal evidence.

Let every Judge have constantly before his eyes, or engraven on his heart, the recommendation of the tutor of Cyrus to his Royal pupil: Ἔπειτα δὲ ἔφη τὸ μὲν νόμιμον, δίκαιον εἶναι· τὸ δὲ ἄνομον, βίαιον. Σὺν τῷ νόμῳ οὖν ἐκέλευε δεῖν τὸν δικαστὴν τὴν ψῆφον τίθεσθαι. "That which is conformable

* It perhaps may be thus translated:—

"There is nothing more cruel, more pernicious, nothing that this country is less able to bear.

"What can be found in that most miserable word *Proscription*, or in all the severity of the time of Sylla, which will be most extraordinary in the history of cruelty?

"I am of opinion, a punishment inflicted upon Roman Citizens by name without a trial."

conformable to law, is justice; and that which is contrary to law, is force and violence. He therefore recommended that every Judge should decide according to the law."

But it will be asked, Is not this an *ex-post-facto* law? That is a law, which is made to punish an action which was innocent at the time it was done, as if it had been a legal crime at that time; as if a law were made this winter to punish severely every one who had killed a butterfly, or a swallow, in the last summer.

Let us consider the nature of the crime with which the Illustrious Defendant is now charged.

The celebrated statute, the 25th *Ed.* III. c. 2, which, for the security of the people of England, declared what actions should be high treason, and that the Judges should adjudge no other action but those specified in that statute to be treason in future, has declared, that "if a man do violate the King's companion, or the King's eldest daughter unmarried, or the wife of the King's eldest son and heir, he shall be guilty of high treason."

The statute has not explained what crime these three female subjects shall be guilty of, if they concur

concur in the criminal action. But it is a common law principle, more ancient than the statute itself, that he or she, who consents to the act of high treason, is also guilty of high treason. All authors therefore agree, that if the females specified, consent to their violation,—the wives by adultery, or the eldest daughter by incontinence,—they also are guilty of high treason.

But where they are deficient in chastity, if their paramour cannot be tried for high treason, none of the three co-operating with him can be found guilty of high treason.

If they consent to a native or to a foreigner in England, they are clearly guilty of treason: but if one of these females should consent to commit adultery with a foreigner out of the kingdom, she is not guilty of treason: for if he were afterwards to come to England, he could not be tried for treason, because he was not at the time under obedience to the laws of England. This, in the present trial, has so been held by the twelve Judges.

If, in England, one of these females, like Potiphar's wife, should solicit unsuccessfully either a native or foreigner, she would be guilty of a high misdemeanour. And if she were to act with a foreigner abroad in a manner which would amount to

to high treason in England, surely no Lawyer will contend that it would not be a subject for an impeachment as a high crime and misdemeanour. The dignity of the Royal Family would be diminished; the moral sentiments of all virtuous women, by the example, if not impaired, would be greatly shocked; and the legitimate succession to the Throne might be rendered uncertain, and the peace and tranquillity of the nation endangered.

If this is a crime which cannot be tried by an indictment and a jury, it is only upon the general common-law principle that every one in the case of an indictment must be tried in the county in which the crime was committed. But this does not apply to an impeachment.

If, then, any one of the Illustrious Personages specified in the statute should be thought to be guilty of an adulterous intercourse with a foreigner abroad, it cannot be disputed but she might be tried in an impeachment for a high crime and misdemeanour; and her innocence or her guilt must be made manifest to her Judges, the House of Lords, and to all the world, precisely by the same witnesses, and by the same laws of evidence, which have been admitted upon this Bill of Pains and Penalties.

A Bill

A Bill of Pains and Penalties, conducted as this has been, is far more favourable to such an Illustrious Defendant so accused, than a trial by impeachment. In an impeachment, each Lord must declare Guilty or Not guilty, upon his honour; but in such a Bill as the present, each Lord declares, in every stage, Content, or Non Content; and several, who are fully convinced of her guilt, may, for various reasons, in every stage, declare Non Content: but he must be a horrid monster of wickedness and iniquity, who declares that he is content that a Bill shall pass to divorce and degrade such an Illustrious Female, when, from the legal evidence, he is fully convinced of her innocence.

After an impeachment, the House of Commons do not enter into a fresh investigation of the subject by the examination of the witnesses; but if they are dissatisfied, by the verdict or declaration, of the guilt of the defendant, or if they wish it should proceed no further, they may refuse to demand judgment, in consequence of which no punishment can be inflicted. — See *Christian's* Edition of Blackstone.

But in the Bill of Pains and Penalties, all the former witnesses, or other fresh witnesses, may be examined; and in every stage it may be put an end to, by a majority of that House.

But

But if ever such a Bill should pass the House of Lords, it is to be hoped and implored that the witnesses will be examined in the same dignified manner, and by the same adherence to the laws of evidence, by which they have lately been examined in the House of Lords*.

Another

* I was glad to see that Mr. Serjeant Onslow, a Member of the House of Commons, gave notice, that if the Bill of Pains and Penalties came into that House, he would, before the examination of witnesses, bring in a Bill to enable the House of Commons, upon that and all future occasions, to examine witnesses upon oath.

I have long represented and lamented this inability, as the greatest defect and blemish in our excellent Constitution. The books which are printed every year, of evidence given before Committees of the House of Commons, I have perused; and several of them with much sorrow and disgust, because they are full of ignorance and the grossest misrepresentation. I am sorry to say, that, at present, a Committee of the House of Commons to examine witnesses upon any part of our Law and Government, has the effect of a proclamation for all manner of persons to come in and abuse and degrade the laws of their country. I know several honourable men of my acquaintance, in high situations, who would not, if they could possibly avoid it, join the witnesses examined by the House of Commons. The Bill ought to provide, that every witness should be examined upon his oath, should be subject to all the penalties of perjury; and if his evidence is ever to be printed, that it should be printed and published immediately, that every honest man might have an opportunity of answering it, where it is untrue and unjust.

A witness

Another distinction between an Impeachment and a Bill of Pains and Penalties, which perhaps may be thought favourable to the defendant, is, That the King has no power to put an end to an impeachment either by a prorogation or a dissolution of the Parliament; but in any stage of the proceedings, either by a prorogation or a dissolution, he has the Constitutional power of terminating a Bill of Pains and Penalties.

In the present Bill, I think a demand has been made for a list of witnesses to be produced, and has been refused. Upon that subject, I think every Lawyer will agree that a delivery of a list of witnesses is unknown, by the common law, to every species of prosecution in the temporal courts.

It

A witness has been known to assert one thing before the House of Commons, and to swear directly the contrary before the House of Lords. A witness before the House of Commons, for prevarication, may be imprisoned till the end of the Sessions.

The reason of this immense defect is easily accounted for: When the House of Commons separated from the House of Lords, in the latter end of the reign of Edward the Third, the House of Lords retained the judicial power, and, as incidental to it, the power of administering an oath.

But the Committees under Grenville's Act, in which they examine witnesses upon oath, adhere to rules of evidence, and do justice with the greatest propriety and dignity.

It is obvious, that it might be highly inconvenient to give a list of foreign witnesses before they arrived in England; for however they might be prevailed upon to come by honest and legal means, by assurances of protection and indemnification, it is very clear that they would be prevailed upon by a much less inducement to stay at home: and even if they yielded to dishonest practices, it is probable that they would be free from all animadversion for it in their own country.

But it is indisputable, that the law of England, before the time of Queen Anne, compelled a prosecutor in no case whatever to disclose the names of the witnesses to a defendant, except as far as the prisoner incidentally learnt them by their being sworn before a magistrate or a grand jury; and even in these cases, a prosecutor is not obliged to call these witnesses, but may call any other witnesses to prove his case.

But in the case of high treason by the 7th *Anne*, c. 21, it was enacted, that a list of the witnesses should be delivered.

I shall conclude this subject by transcribing what that great Judge, and sincere friend to the liberty of the subject, (*Sir M. Foster*,) has said upon it,

it, and which some, perhaps, will think not inapplicable to the present time.

" I will now consider the clauses in the 7th of Queen *Anne*, which I before hinted at. The 11th section of that Act provideth, ' That when any ' person is indicted for high treason or misprision of ' treason, a list of the witnesses that shall be pro- ' duced at the trial for proving the said indictment, ' and of the jury, mentioning the names, profession, ' and place of abode of the said witnesses and ' jurors, shall be given at the same time that the ' copy of the indictment is delivered to the party ' indicted; and that copies of all indictments for the ' offences aforesaid, with such lists, shall be delivered ' *ten days* before the trial, and in the presence of ' two or more credible witnesses.'

" The furnishing the prisoner with the names, professions, and places of abode of the witnesses and jury, so long before the trial, may serve many bad purposes, which are too obvious to be mentioned. One good purpose, and but one, it may serve. It giveth the prisoner an opportunity of informing himself of the character of the witnesses and jury. But this single advantage will weigh very little in the scale of justice or sound policy, against the many bad ends which may be answered by

by it. However, if it weigheth any thing in the scale of justice, the Crown is entitled to the same opportunity of sifting the character of the prisoner's witnesses.

" Equal justice is certainly due to the Crown and the public. For let it be remembered, that the public is deeply interested in every prosecution of this kind that is well founded. Or shall we presume that all the management, all the practising upon the hopes or fears of witnesses, lieth on one side? It is true, power is on the side of the Crown. May it, for the sake of the Constitutional rights of the subject, always remain where the wisdom of the law hath placed it! But in a Government like ours, and in a most changeable climate, power, if, in criminal prosecutions, it be but suspected to aim at oppression, generally disarmeth itself. It raiseth and giveth countenance to a spirit of opposition, which, falling in with the pride or weakness of some, the false patriotism of others, and the sympathy of all, not to mention private attachments and party connexions, generally turns the scale to the favourable side, and frequently against the justice of the case."

Every question which could admit of any reasonable doubt, whether it was conformable or not to the laws of evidence, has been referred to the

the Judges: but there was one proposition, which surely no Lawyer could think admitted of a doubt, yet, without referring it to the Judges, was decided in favour of the Defendant; viz. That her Counsel should have the liberty of calling back any witness for the prosecution, whose examination was closed by cross-examination and re-examination. That was not referred to the Judges: and I observed that the Lord Chancellor, and Lord Redesdale, who has been a Chancellor, voted in a minority against the permission.

I conceive the universal practice, long firmly established in all the courts, from the Court of the Lord High Steward to the Quarter Sessions, is this, viz. That after the cross-examination, and re-examination upon that, neither side can call back a witness. But the Judge or the Court may call back a witness, to ask him a question; and that question, I should think, ought to be confined to one that is connected with his former evidence, and which is agreeable also to the law of evidence. The Counsel on either side may suggest such a question to the Judge or the Court; and if the Court think it will assist in promoting justice according to law, it then will adopt it, as a question originating from itself. A power beyond that might be greatly abused, either by one side or the other, or by both, more particularly in a long trial:

for

for the most honest and honourable witness, any Peer of the House of Lords, might be called back, and asked, If he did not make declarations to a certain effect in the Pump Room at Bath, in the hearing of John Smith and William Thompson in particular: though he should deny that he ever made such declarations to them or to any one, either there or elsewhere, and he should positively swear that he never was in the Pump Room at Bath, or in any other room there, yet John Smith and William Thompson may be called to prove what he denies; and thus the most honourable witness, a Prince of the Blood Royal, might be discredited; his country, or the cause, may lose the benefit of his testimony; and he himself be subject to all the infamy and punishment of perjury by two men who have been actually guilty of it. These are some of the inconveniences of a departure from those laws which have long been established by the wisdom of our ancestors. The law knows no difference, whether the defendant is the wife of a King, or the wife of the lowest of his subjects.

In the observance of general rules, there may be cases of hardship: the King cannot be a witness for his own daughter, or for the daughter of any other man; so neither he nor any man can ever be witness for or against his own wife. So if the wife of the eldest son of the King, in a trial for her life, were

were charged with sleeping with another man on a particular night at a distance from home, her husband could not be permitted to prove that on that night she slept in his own bosom; or the King himself could not prove on that night she was in the bosom of his family. There is wisdom in the rule, and true liberty in its being common and equal to every subject alike.

It has been said, that in the first Divorce Bill before the House of Lords, in the case of the Duke of Norfolk and his wife, a list of the witnesses was previously given by the Duke to his Duchess. It appears by the Journals of the House of Lords, that, after the Bill was brought into the House of Lords, and the Duchess had put in an answer to it, her Proctor demanded that the Duke's witnesses, when they came to be sworn, should give in their names, residences, and employments, as they do in the spiritual courts: this was granted; and on Saturday the 24th January, 1692, all the witnesses for the Bill were sworn, and they gave their names and descriptions; and on the following Tuesday they were examined, and their evidence taken down. Afterwards, the Duchess's witnesses were sworn in like manner, and their evidence taken shortly afterwards. This was said, at that time, to be the practice of the spiritual courts.

But

But the case clearly proves, that at that time, in a Divorce Bill, there was no communication of the names or description of the witnesses on either side, till they came to be sworn; and only one full day, besides Sunday, was allowed for making inquiries respecting them.

Since that time, the Lords, to prevent fraud and collusion by the husband and wife, in obtaining a Bill of Divorce to dissolve the marriage contract, require that the husband shall have gained a sentence of divorce from bed and board in the spiritual court, on account of the adultery of his wife; and also a verdict for damages against the seducer of the wife, in an action at law. But a sentence in the Commons, and the verdict of a jury, may be dispensed with in the case of private families, where they are impracticable.

This being a very important part of the Bill of Pains and Penalties, I will insert what Sir William Blackstone has said upon the subject of Divorce, and what I have added in a note:—

"Divorce *a mensa et thoro* is when the marriage is just and lawful *ab initio,* and therefore the law is tender of dissolving it; but for some supervenient cause, it becomes improper or impossible

for the parties to live together: as in the case of intolerable ill temper, or adultery, in either of the parties. For the canon law, which the common law follows in this case, deems so highly and with such mysterious reverence of the nuptial tye, that it will not allow it to be unloosed for any cause whatsoever, that arises after the union is made. And this is said to be built on the divine revealed law; though that expressly assigns incontinence as a cause, and indeed the only cause, why a man may put away his wife and marry another. The Civil law, which is partly of Pagan original, allows many causes of absolute divorce; and some of them pretty severe ones (as if a wife goes to the theatre or the public games, without the knowledge and consent of the husband); but among them, adultery is the principal, and with reason named the first. But with us in England, adultery is only a cause of separation from bed and board: for which the best reason that can be given is, that if divorces were allowed to depend upon a matter within the power of either of the parties, they would probably be extremely frequent; as was the case when divorces were allowed for canonical disabilities, on the mere confession of the parties, which is now prohibited by the canons. However, divorces *a vinculo matrimonii*, for adultery, have of late

late years been frequently granted by act of Parliament*."—BLACKSTONE, vol. I. p. 440.

A suit in the Commons, and an action, must be dispensed with in the case of the King. He could bring no action: in his case, the trespass would be merged in the treason. A divorce *a mensa et thoro* would be of no avail to him, for he could not be

* "To prevent divorces *a vinculo matrimonii* from being obtained in Parliament by fraud and collusion, the two Houses not only examine witnesses, to be convinced of the adultery of the wife, but they require also that the husband shall have obtained a sentence of divorce in the spiritual courts, and a verdict with damages in a court of law from some one who has had criminal intercourse with the wife.

"This is not a standing order of the House of Lords, but it is adopted as a rule of caution; and it may be dispensed with, where the circumstances are such that the adultery of the wife can be proved by satisfactory evidence, and where, at the same time, it is impossible for the husband to obtain a verdict in an action at law.

"It was dispensed with in the case of a naval officer, whose wife had been brought to bed of one child, in his absence upon duty abroad; and upon his return was far advanced in her pregnancy with a second, and where he could not discover the father. So in another case, where a married woman had gone to France, was divorced there, and had married a Frenchman.

"It would also be dispensed with, if the adulterer should die before the husband could obtain a verdict."—*Note by Mr. Christian.*

be sued for a restitution of conjugal rights. All that the spiritual courts can grant, is, to free the husband from the intrusion of a woman who has made herself obnoxious to him by criminality*. But a subject cannot have this benefit, if she has the power of recrimination. But recrimination in the case of a King is the greatest of all solecisms in the government of the country. The Sovereign never can be brought to a trial, either by crimination or recrimination. The laws of all nations exempt the Sovereign from every animadversion in public courts. Even his representative, an ambassador, for wise public reasons, has the same exemption. This never can be suggested without conveying also to the mind an idea of a total subversion of the monarchy, and a dissolution of the government.

If the Illustrious Defendant should be proved, to the complete satisfaction of both Houses of Parliament, by nothing but legal evidence, that she has had an adulterous intercourse with a foreigner, her menial servant, it may be presumed that every serious

* Milton, a strenuous advocate both for Religious and Civil Liberty, has written largely for the permission of divorce between husbands and wives, where there is real reciprocity of unhappiness or incompatibility of mind and temper. Much of what he advanced is peculiarly applicable to Royal marriages.

serious well-judging person will be of opinion, that the part of the Bill which declares that she shall be divorced from her husband, is the most appropriate part of it. An adulterous intercourse by a Queen Consort, the King's eldest daughter, and the wife of the King's eldest son, with any man in England, was punishable with death, as high treason, probably for many ages before the 25th *Ed.* III. It was confined, at that time, to these three females, by that statute; because, by their misconduct, the legitimate succession to the Crown would be endangered, and, by the example of females in their high stations, the moral sentiments and conduct of all other women in the kingdom were likely to be contaminated and corrupted.

It has become a proverbial saying, repeated with some degree of approbation, that 'Cæsar's wife ought not to be suspected.' Clodius, a dissolute Roman youth, was discovered in female attire in the house of Pompeia, Cæsar's wife, who was then celebrating the awful and mystic sacrifices of the goddess Bona Dea. At the trial of Clodius, "*Cæsar negavit se aliquid comperisse. Interrogatus cur igitur repudiasset uxorem: Quoniam, inquit, meos tam suspicione quam crimine judico carere oportere.*" SUETON. J. Cæsar. 74.—That is, "Cæsar declared that he had discovered nothing against his wife: but being asked why then he had divorced her, he

he said, Because every one connected with me ought to be clear both from guilt and from suspicion."

Cæsar did not do that act, and assign that reason for it, for his own honour and happiness, but for the honour and happiness of all his subjects; because Cæsar's wife was to be a pattern and example to the wife and daughter of every Roman citizen.

This might have been done in a country whose Magna Charta was *Quod principi placuit, legis vigorem habet;* but the people of England, or their legitimate representatives, will never suffer a Sovereign of Great Britain to repudiate his wife for suspicion, or for less than the most irrefragable proofs, manifested to all the world, of her criminality, and that also in a country where chastity is pre-eminently denominated the *virtue* of every female, and where, if that is lost, she is thought to have nothing left worth preserving.

" Virtue and Vice had boundaries, in old time,
Not to be pass'd; and she that had renounc'd
Her sex's honour, was renounc'd herself,
By all that priz'd it;—not for prudery's sake,
But dignity's, resentful of the wrong.
'Twas hard, perhaps, one here and there a waif
Desirous to return, and not receiv'd;
But 'twas an wholesome rigour in the main,

And

> And taught th' unblemish'd to preserve with care
> That purity, whose loss is loss of all."
>
> COWPER's *Task*, Book 3.

If the three illustrious persons, the Queen Consort, the King's eldest daughter, or the wife of the King's eldest son, should ever be impeached for *that purity not preserved with care*,—and if every Peer, without exception, should pronounce "*guilty upon my honour*,"—it is indisputably true that they could not make a divorce part of their sentence:—that must be done by a distinct, independent Act of Parliament.

But in a Bill of Pains and Penalties, where there is a strict adherence to the law of evidence,—that law of evidence which must be observed both in an impeachment and also in an Act of Parliament for a divorce,—there seems to be no repugnancy, but a consistency and propriety that a clause for a divorce should be made part of such a Bill.

Since the introduction of the Bill of Pains and Penalties into the House of Lords, I have frequently read, in the Newspapers, that the word *Conspiracy* has been made use of in the very extraordinary papers or speeches ascribed to persons out of the House of Lords, and also that it has been frequently used by very dignified characters within the

the House, but with a degree of vagueness and uncertainty which I lamented much to observe, because it seemed ill calculated to advance the cause of truth and justice.

Several questions have been put to the Judges, upon the legal evidence, to prove a Conspiracy; and God forbid that that or any other crime should ever be proved, or attempted to be proved, by any other evidence than that which has been legal evidence for ages past, and will be legal evidence for ages to come, if not constitutionally altered by the united wisdom of the King, Lords, and Commons, in Parliament assembled.

If I were called upon to explain what is a Conspiracy, to a person with an imperfect knowledge of the law of England, I should say it was a combination of two or more to do an illegal action: every conspiracy must be that; yet every such combination is not a conspiracy; as a combination between two poachers to kill game in a gentleman's preserve in the night time was held by Lord Ellenborough, and the Court of King's Bench, not to be a conspiracy; because, otherwise, a whole field of hunters, or any two qualified gentlemen coursing or shooting, where they were trespassers, would be guilty of a conspiracy: but a combination

to

to take away the character of an innocent individual is a conspiracy of a very nefarious nature indeed.

The object of the notorious conspiracy of the Cock-Lane Ghost was to induce the public to believe that a particular innocent individual had been guilty of the crime of murder. All who were proved to have been active to produce that wicked illegal object, were found guilty of a conspiracy, and received a severe sentence, but not more severe than just, from Lord Mansfield. One man stood in the pillory three times.—King *v.* Parsons, 1 *Black. Rep.* 392. and *Christian's Charges*, 119.

It has also been held, that if two or more combine to destroy or injure the credit of a banker, they are guilty of a serious conspiracy. Ibid. 118.

It will therefore follow, that those who join in charging innocent and honourable persons with a conspiracy, are themselves guilty of a conspiracy,—and of a conspiracy of no ordinary magnitude. When the wicked combine, the virtuous and the good must associate; their union forms the bonds of honourable society, and of every wise and just government. Those who are particularly employed in the administration of justice, must necessarily

necessarily employ officers and agents under them; and if any one of them acts wickedly and corruptly, he alone is to be punished for his illegal conduct.

He who suborns a witness to commit perjury, or who attempts it, or who advises a witness not to appear in a court to give his evidence, is guilty of a high misdemeanour: or he who advises or solicits any one to do this, though the person so solicited resents it—as every honest man ought to do,—yet the adviser may be punished to the same extent as if his advice had succeeded, or if he had been engaged in the foulest conspiracy.

The Counsel, who are retained for the plaintiff or defendant, prosecutor or prisoner, are frequently consulted what legal evidence will be necessary to support their client's case: of course, they will answer, to the best of their judgment, all that can be honourably done according to law:—but God forbid that they should be held to be guilty of a conspiracy, if it should afterwards be proved, or be attempted to be proved, that some wickedness has been committed in procuring the evidence which they thought necessary! Or all the justices at a Quarter Sessions (perhaps several of them members of the House of Lords) are not to be held up to infamy, as conspirators, because one constable within

within the county, or one justice upon the bench, has been guilty of a misdemeanour in the execution of his office.

If this were so, every prisoner or defendant might easily get the benefit of such testimony, by either bribing a witness to prove that such an offer had been made by an honest agent or officer, or by bribing an agent or an officer to make such an offer, one who had been honestly employed by others to assist in the advancement of legal justice.

The evidence in the case of partners in trade, and those who are employed or commissioned to assist in the administration of criminal justice, is quite different. In partnerships for civil purposes, by the nature of the contract, each places a confidence in the honesty and judgment of his partner; and the words and acts of one will bind all the rest. But the law of England, with respect to those who are engaged in the pursuit and administration of justice, has been, and I trust will be, eternally different; because I hope not only every Lawyer will agree that I have stated the law correctly, but that every man of sense will think it stands to reason, and is conformable to the principles of universal justice.

Every friend to his country, and to the correct administration of justice in it, must grieve to have seen

seen public attempts to terrify the Lords from the faithful discharge of their duty. If a single vote has been gained by it, the public justice of the nation has, in fact, been perverted: and surely every attempt to influence a court of justice, except by fair proofs and ability in argument, must be equally incorrect and illegal. Whether we make an application to the passions of fear or avarice, the difference consists only in a public robbery or a clandestine fraud. By the first mode, the courage of all is assailed at once: by the second, which never is likely to be successful in the highest court, or in any other court, the virtue of each must be tempted one by one.

The House of Lords in England is now, and long has been, the most pure, honourable, independent, learned, wise, venerable, solemn, and august tribunal, which the sun from heaven shines upon. No parallel of their united wisdom and justice, gravity and dignity, can be found in any assemblage of men upon the surface of the earth: and it may ever be confidently expected, that they will also possess the courage to be regardless of all menaces and attempts to intimidate, and will never lose sight of their unerring guide,—

Fiat justitia, ruat cœlum;

but will, with one undaunted voice and heart, pronounce—

Si

Si fractus illabatur orbis,
Impavidos ferient ruinæ.

Every one who is a friend also to the government of his country, must view with deep affliction the shocking unconstitutional endeavours to overthrow that government, which our ancestors have never spared their blood to transmit unimpaired to us, and which has hitherto been the admiration and envy of all the rest of the world. The author of these Observations has never yet been the subject of any other Government; but he is contented;—and is happy to learn, from all his countrymen who have had practical experience abroad, that they have all panted to return to enjoy the blessings of justice and liberty in England.

Every true Englishman cannot but read with delight what has been written by a foreigner, whom the scholars of every country concur is the most profound scholar that ever wrote upon justice and governments. In another publication,* I have said, that he is one, who, from the peculiar nature of his studies, was intimately acquainted with all the best existing Governments in the world, and who had the most correct and perfect knowledge of those rules of justice which secure the liberty and promote

* See *Christian's Charges*, p. 312.

promote the happiness of mankind; and in whose writings the learned men of all nations have yet found the least, if any thing, to censure and to blame;—I mean VATTEL, the author of the "*Law of Nations:*" he has pronounced the following just and beautiful panegyric upon the English Government:—

"That illustrious nation (speaking of England) distinguishes itself in a glorious manner, by its application to every thing that can render the State the most flourishing. An admirable Constitution there places every citizen in a situation that enables him to contribute to this great end, and everywhere diffuses a spirit of true patriotism, which is zealously employed for the public welfare. We there see mere citizens form considerable enterprises, in order to promote the glory and welfare of the nation: and while a bad prince would be abridged of his power, a king endowed with wisdom and moderation finds the most powerful succours to give success to his great designs. The nobles and the representatives of the people form a band of confidence between the monarch and the nation, and concur with him in every thing that concerns the public welfare; ease him in part of the burden of government; confirm his power; and render him an obedience the more perfect, as it is voluntary. Every good citizen sees that

that the strength of the State is really the welfare of all, and not that of a single person. Happy Constitution! which they did not suddenly obtain: it has cost rivers of blood; but they have not purchased it too dear. May luxury, that pest so fatal to the manly and patriotic virtues, that minister of corruption so dangerous to liberty, never overthrow a monument that does so much honour to human nature,—a monument capable of teaching kings how glorious it is to rule over a free people!"

VATTEL'S *Law of Nations*, Book I. chap. 2.

Every good government must consist of an union or association of the wise and good to resist the designs of the ignorant and the wicked; and they must be supported by power and strength, to carry into effect the decisions of wisdom and justice: but miserable and dreadful must be the consequences, if those who possess the muscular strength of a people are led, by the artifices of designing men, to resist a government cemented by the wisdom and experience of ages.

How unqualified those are to form a correct judgment of the complicated affairs of every government whose thoughts must be confined to employments of manual labour, has been admirably described by an author whom divines do not with certainty rank amongst the Inspired Writers; but his

his book contains an infinite fund of wisdom, beautifully expressed;—I mean Jesus the son of Sirach, the author of Ecclesiasticus. Nothing in the whole of the Old Testament can be found more just and satisfactory than the following extract:—

The wisdom of a learned man cometh by opportunity of leisure; and he that hath little business shall become wise.

How can he get wisdom that holdeth the plough, and that glorieth in the goad; that driveth oxen, and is occupied in their labours, and whose talk is of bullocks? He giveth his mind to make furrows; and is diligent to give the kine fodder.

So every carpenter and work-master, that laboureth night and day: and they that cut and grave seals, and are diligent to make great variety, and give themselves to counterfeit imagery, and watch to finish a work.

The smith also sitting by the anvil, and considering the iron work, the vapour of the fire wasteth his flesh, and he fighteth with the heat of the furnace: the noise of the hammer and the anvil is ever in his ears, and his eyes look still upon the pattern of the thing that he maketh; he setteth his mind to finish his work, and watcheth to polish it perfectly.

So doth the potter sitting at his work, and turning the wheel about with his feet, who is alway carefully set at his work; and maketh all his work by number.

He

He fashioneth the clay with his arm, and boweth down his strength before his feet; he applieth himself to lead it over; and he is diligent to make clean the furnace.

All these trust to their hands: and every one is wise in his work.

Without these cannot a city be inhabited: and they shall not dwell where they will, nor go up and down.

They shall not be sought for in public counsel, nor sit high in the congregation: they shall not sit on the judges' seat, nor understand the sentence of judgment: they cannot declare justice and judgment, and they shall not be found where parables are spoken. But they will maintain the state of the world, and all their desire is in the work of their craft.—ECCLESIASTICUS, xxxviii. 24—34.

ERRATA.

P. 30, line 8, after *prisoners* add *witnesses*.

In page 70, the lowest paragraph ought to have been placed at the end of the Note.

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